(24,608)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 390.

CITY OF OWENSBORO, KENTUCKY, APPELLANT,

vs.

OWENSBORO WATER WORKS COMPANY OF OWENSBORO, KENTUCKY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF KENTUCKY.

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Citation.

Issued February 15th, 1915.

UNITED STATES OF AMERICA,
Western District of Kentucky,
at Owensboro, Sixth Judicial Circuit, ss:

To Owensboro Water Works Company, of Owensboro, Ky., Greeting:

You are hereby cited and admonished to be and appear at a session of the Supreme Court of the United States, to be holden in the City of Washington, D. C., on the 15th day of March, next, pursuant to an appeal allowed by the District Court of the United States for the Western District of Kentucky, at Owensboro, wherein the City of Owensboro, Kentucky, is appellant and you are appellee, to show cause, if any there be, why the Decree rendered against the said appellant as in the said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward D. White, Chief Justice of the United States this 15th day of February, in the year of our Lord, one thousand nine hundred and fifteen, and of the Independence the one hundred and thirty-nineth.

WALTER EVANS, *Judge.*

We hereby accept service of citation.

W. T. ELLIS,
CLARENCE M. FINN,
Attorneys for Plaintiff.

1 Proceedings in the District Court of the United States for the Western District of Kentucky, at a Regular Term, Beg-n and Held at the Federal Court Hall, in the City of Owensboro, on Monday, November 23rd, A. D. 1914.

Present: Honorable Walter Evans, Judge.

No. 3.

OWENSBORO WATER WORKS COMPANY, Complainant,
v.
CITY OF OWENSBORO, KENTUCKY, Defendant.

Be it remembered, that heretofore, to-wit on the 8th day of July, A. D. 1914, came the plaintiff Owensboro Water Works Company, by Wm. T. Ellis and C. M. Finn, their solicitors, and filed in the

Clerk's office of our said Court, their Bill in Equity against the above named defendant, which Bill is in the following words and figures, to-wit:

2 *Bill in Equity.*

Filed July 8th, A. D. 1914.

Your Orator, Owensboro Water Works Company, of Owensboro, Kentucky, states it is a corporation, created, organized and doing business in Owensboro, Daviess County, Kentucky, under and by virtue of the General Corporation Laws of the Commonwealth of Kentucky; and among the powers conferred upon it by its said Articles of Incorporation, and under the general corporation laws of the Commonwealth of Kentucky, is the right to own, maintain and operate a system of water works in Owensboro, for the purpose of supplying said city and the inhabitants thereof with water for public and private purposes; and it has also the power to contract and be contracted with, to sue and be sued in its corporate name; The Owensboro Water Works Company of Owensboro, Kentucky.

Its original Articles of Incorporation were signed, acknowledged and lodged for record on the 3rd day of June, 1889, in the County Court Clerk's office of Daviess County, Kentucky, and duly recorded therein, and a certified copy thereof filed with the Secretary of State for the Commonwealth of Kentucky.

A duly certified copy of said Articles of Incorporation is filed herewith, and made part hereof marked Exhibit No. 1.

By the terms of said Articles of Incorporation it is provided that the corporation should terminate in twenty-five years from and after the date of its incorporation, but complainant states that in conformity with the General Corporation laws of the Commonwealth of Kentucky, and by and with the written consent of more than

3 three-fourths of the stockholders of complainant Company, its Board of Directors did on May 6, 1914, sign, execute and acknowledge Amended Articles of Incorporation and filed the same in the County Court Clerk's office in and for Daviess County, Kentucky, and a copy thereof with the Secretary of State, wherein and whereby the corporate life of Complainant Company was and is extended for a period of twenty-five years from and after June first, 1914, and Complainant Company, under and by its said Articles of Incorporation, as amended, on May 6, 1914, as aforesaid, is now a body corporate under and by virtue of the General Corporation laws of the State of Kentucky, and its corporate life will not terminate until twenty-five years from and after June first, 1914.

A duly certified copy of said Amended Articles of incorporation is filed herewith and made part hereof marked "Exhibit No. 2."

Your orator further shows that defendant, City of Owensboro, is a municipal corporation created, organized and existing under the laws of the State of Kentucky.

Said defendant was originally created a municipal corporation by an Act of the General Assembly of the Commonwealth of Kentucky,

entitled "An Act to Incorporate the City of Owensboro of Daviess County," which was approved and became a law on February 16, 1866; and it has been sinde said date continued a municipal corporation by the following acts of the General Assembly of the Commonwealth of Kentucky, namely "An Act reducing to One all the Acts relating to the City of Owensboro," which was approved and became a law on the 6th day of March, 1876; "An Act Creating a New Charter for the City of Owensboro," which was approved and became a law on March 18, 1882; "An Act for the Government of Cities of the Third Class," which was approved and became a law on June 14, 1893, and since said date defendant has existed as
4 a municipal corporation by virtue of the last named act.

By said Act of February 16, 1866, and by the Act of March 6, 1876, the Common Council of defendant City has conferred upon and vested in it, full power to make, establish and regulate wells, cisterns, reservoirs and pumps and to provide for the furnishing of said city and the inhabitants thereof with water; and to prevent and guard against damage by fire; to purchase fire engines and fire apparatus, to organize fire companies, and to provide by contract for the construction, maintenance and operation of a system of water works in said city for said purpose; and to grant to others the privilege of laying pipes, mains and conduits in and through the streets of said city, and to attach fire hydrants thereto and to supply said city and its inhabitants thereof with water for public or domestic purposes.

All of said powers were continued and remained vested in the Common Council of defendant City by and under an Act of March 18, 1882, as above referred to.

Your Orator further shows that by Articles of Incorporation duly executed and recorded in the office of the clerk of the Daviess County Court, and in the office of the Secretary of State for the Commonwealth of Kentucky, there was created on the 9th day of September, 1878, a corporation known as "Owensboro Water Company;" and by virtue of said Articles of Incorporation and under the laws of the State of Kentucky then in force, said Corporation had conferred upon it the power to contract and be contracted with; to sue and be sued in its corporate name; and to build, construct and operate in the City of Owensboro, a system of water works for supplying water to said City and the inhabitants thereof for both public and private purposes; and to have granted to it by said city the right, privilege and franchise to lay water pipes, conduits, and other neces-
5 sary appliances in the streets, public alleys and public places in said city.

After the incorporation of said Owensboro Water Company, as aforesaid, to-wit: on the 10th day of September, 1878, the defendant city being thereunto fully authorized and empowered so to do, by its charter, then in force, made and entered into a contract with said Owensboro Water Company, wherein it granted to it, its successors, and assigns, the right, privileges and franchise to construct and operate in the City of Owensboro a system of water works for supplying said city and the inhabitants thereof with water form the Ohio River,

and the right and franchise to use the streets, alleys and other public highways within said city, or within the future limits of said city, for the purpose of laying its pipes, conduits, hydrants and fountains for the supply of water, and for the purpose of repairing said pipes, conduits, hydrants and fountains so maintained in the streets, alleys and other public places within said city.

Your Orator further shows that on June 3, 1889, the City of Owensboro had greatly increased in population since the incorporation of the Owensboro Water Company in 1878, and the territory then within the corporate limits of defendant City had been so extended as to include large areas not theretofore embraced therein and it was then necessary that large extensions and improvements should be made in said water works system in said City for the purpose of supplying said city and the inhabitants thereof with water; to this end the complainant, The Owensboro Water Works Company, of Owensboro, Kentucky was incorporated with a capital stock of $500,000, and with an authorized indebtedness not to exceed two-thirds of the amount of its capital stock, and The Owensboro Water Company was authorized by defendant city to sell and transfer all of its property of every kind to the Owensboro Water Works Company, of Owensboro, Kentucky, and in order to induce said Owensboro Water Works Company, of Owensboro, Kentucky, to
6 purchase the Water Works system of the Owensboro Water Company, and make the necessary extensions and improvements in its said water Wodks system, the Mayor and Common Council of defendant City on June 3, 1889, entered into a contract with Complainant Company wherein and whereby defendant City granted to Complainant Company, its successors and assigns for and during the existence of Complainant Company the franchise, license and privilege to maintain, complete and operate a water works system in the City of Owensboro, and to use the streets, alleys and other public highways within said city for laying, repairing and taking up its mains, service pipes, hydrants, and other apparatus for supplying the City of Owensboro, and the inhabitants thereof with water.

Said contract of June 3, 1889, was evidenced by an ordinance, which was passed by the Mayor and Common Council of the city of Owensboro, on Monday, June 3, 1889, which said ordinance and the records of the meeting of the Common Council held on June 3, 1889 are in words and figures as follows, to-wit:

"COUNCIL HALL, Monday, June 3rd, 1889.

"The following ordinance was submitted and read, whereupon on motion the rules of order were suspended as to voting on ordinances and the same, after its second reading, was enacted by the following vote, to-wit: Ayes, Messrs. Baer, Vargason, Higdon, Cullen, Decker. Noes, None.

"Whereas the Owensboro Water Works Company, of Owensboro, Kentucky, a corporation duly organized and existing under the laws of the State of Kentucky is ready to purchase the water works of

the Owensboro Water Company, together with its existing contracts for supplying the city of Owensboro and the inhabitants of said city and its vicinity with water, and whereas it is desired by the said two companies in order that the said purchase may be consummated, that the City of Owensboro grant to the said The Owensboro Water Works Company, of Owensboro, Kentucky, the franchises and license to maintain, complete and operate water works in the City of Owensboro and to use the streets, alleys and other public highways within the said city for laying, repairing and taking up mains, service pipes, hydrants and other apparatus for the supply of water, and that the City of Owensboro accept the said The Owensboro Water Works Company of Owensboro, Kentucky, as the successor to the contract made by the City of Owensboro, with the Owensboro Water Company for hydrant rentals; now in order to enable the said companies to carry out their negotiations, and to vest the contracts of the Owensboro Water Company for hydrants as fully in the said the Owensboro Water Works Company, of Owensboro, Kentucky as if they had been originally made by the City of Owensboro with the said The Owensboro Water Works Company, of Owensboro, Kentucky.

Be it ordained by the common council of the city of Owensboro:

Sec. 1. That in consideration of the purchase by the Owensboro Water Works Company, of Owensboro, Kentucky, of the water works of the Owensboro Water Company, the franchise and license are hereby granted to the Owensboro Water Works Company, of Owensboro, Kentucky, and to its successors and assigns, for and during the existence of the said corporation, to maintain, complete and operate water works in the City of Owensboro for supplying the city of Owensboro and the inhabitants of said city and its vicinity with water for public and private purposes, and to use within the present and future limits of the city of Owensboro, the streets, alleys and other public highways thereof for the purpose of laying, repairing and taking up mains, service pipes, hydrants, and other apparatus for the supply of water.

"But there shall be no continued unreasonable obstruction of the said streets, alleys and other public highways, and after their use from time to time, they shall be restored by the said water works company as near as practicable to their former condition; and the said grant is subject to the existing right of purchase of the said water works by the said City of Owensboro.

Sec. 2. That, in like consideration of the said purchase, by the Owensboro Water Works Company, of Owensboro, Kentucky, of the water works of the Owensboro Water Company, the City of Owensboro hereby accepts the said The Owensboro Water Works Company of Owensboro, Kentucky, as the successor to the contract for hydrant rental now existing between the City of Owensboro and the Owensboro Water Company as fully as if such existing contracts had been originally made by the City of Owensboro with the said The Owensboro Water Works Company, of Owensboro, Kentucky, without the intervention of the said Owensboro Water Company.

Sec. 3. That the consent of the City of Owensboro is hereby given

to the consummation of the said purchase of the said water works of the Owensboro Water Company by the Owensboro Water Works Company of Owensboro, Kentucky, and upon such consummation the mayor and city Clerk of the City of Owensboro are hereby authorized and instructed to seal duplicate copies of the ordinance with the seal of the City of Owensboro, and to sign such copies as a contract between the City of Owensboro, and the Owensboro Water Works Company, of Owensboro, Kentucky, and to accept the other in behalf of the City of Owensboro, when signed and sealed
9 by the said The Owensboro Water Works Company, of Owensboro, Kentucky.

Sec. 4. This ordinance shall take effect at its passage and publication.

JOE LEE, *Mayor.*"

PHIL R. ZULAUF, *Clerk.*

Your Orator furt-er states that immediately after said ordinance was adopted by the Mayor and Common Council of Defendant City, this complainant Company accepted said ordinance and the grant therein contained, and in pursuance thereof and relying upon the rights, privileges and franchises thereby and therein conferred upon and vested in it, and relying upon the faith that defendant City would perform its said contract, the complainant Company at great expense purchased the water works of the Owensboro Water Company and it has from time to time and at great expense, extended its said Water works system, constructed an expensive pumping station, and equipped the same with expensive machinery, and it has laid service pipes, mains and other apparatus for supplying the citizens of Owensboro with water in many of the streets, alleys and other public ways of the city of Owensboro; and complainant Company has since the passage of said ordinance of June 3, 1889, above referred to owned, operated and maintained and it now owns, operates and maintains a water works system in the City of Owensboro fully equipped to furnish the City of Owensboro, and the inhabitants thereof with wholesome water; and it states that when said ordinance was accepted by it, as aforesaid, it then and thereby became, was and is an irrespealable contract between the complainant and Defendant City.

10 A duly certified copy of said ordinance of June 3, 1889, is filed herewith as part hereof, marked Exhibit No. 3.

Your Orator further shows that by said ordinance and the preamble thereto, defendant City did grant to complainant Company, and to its successors and assigns, for and during the existence of said Complainant Company, the franchise and license to maintain, complete and operate a water works system in the City of Owensboro, for supplying the City and the inhabitants of said city, and its vicinity, with water for public or private purposes, and the franchise and license to use, within the present or future limits of defendant city, the streets, alleys and other public highways, thereof, for the purpose of laying, repairing and taking up mains, service pipes, hydrants and other apparatus for the supply of water, and said contract

so to use the streets, alleys and other public highways of defendant city for the purpose of laying, repairing and taking up the mains, service pipes, hydrants and other apparatus for supplying the city of Owensboro and the inhabitants thereof and its vicinity, with water for public and private purposes is now in full force and effect and will continue in full force and effect for and during the existence of complainant Company; and defendant City has no power, right or authority to alter, abridge or repeal said ordinance of June 3, 1889, or to alter or abridge any of the contract rights therein vested in Complainant Company for and during its corporate existence.

Complainant Company respectively shows Your Honor that it has a capital stock of $300,000, which sum has been invested in the purchase from the Owensboro Water Company of its water works system, which it maintained in the City of Owensboro at the time Complainant company was organized and further invested in improving, extending and re-constructing said water works system; and in addition to its capital stock, it has issued first mortgage
11 bonds upon its property to the amount of $250,000 which bonds are now outstanding and unpaid, and Complainant Company has invested the funds received by it from the sale of said bonds from time to time in the extension, reconstruction and equipment of its said water works system, and it now has a very valuable plant fully equipped to furnish the City of Owensboro and the inhabitants thereof with wholesome water, as above set out, its said property being worth not less than $250,000; and the amount in controversy herein is of more than $3,000.00 in value, exclusive of interest and costs.

Your orator further shows that the Mayor and Common Council of the City of Owensboro passed an ordinance which was approved November 7th, 1901, and which ordinance is now in full force and effect in said city, never having been repealed, altered or amended, which ordinance is in words as follows:—

"An Ordinance concerning Excavation in Streets, Alleys, Public Places, Tapping Sewers, Making Gas and Water Connections.

"Be it ordained by the Common Council of the City of Owensboro:—

§1. That it shall be unlawful for any person, company or corporation, or any servant or employe of any person, or corporation, to dig any trench or make any excavation in any street, alley, sidewalk, or any of the public grounds, of said city, for the purpose of laying, taking up or repairing any drain pipe, sewer, or any connection, with any water pipe, gas pipe, or other pipes or repair of said street car tracks, or other purpose in the City of Owensboro without first having obtained a written permit to do so as hereinafter provided, and without first having made the deposit and executed the bond hereinafter described.

12 §2. That it shall be the duty of the mayor and city engineer to determine whether any of the excavations mentioned in the first section of this ordinance are necessary to be made, and

if it is decided that they may be made, the engineer shall prescribe in writing the manner in which they shall be made and the place at which the same shall be made and fix the time of making the same, and issue a permit therefor, and shall supervise and control the making of the same, and none of the excavations mentioned in the first section shall be made until such permit shall be obtained from the city engineer. Said engineer shall, with the consent and approval of the council, prescribe rules and regulations and general plans and specifications applicable to all such work, and all such work shall be done in strict accordance therewith.

§3. That before any permit shall be issued to any person, company or corporation to make any of the excavations mentioned in the first section of this ordinance, a deposit shall be made by the person, company, or corporation desiring to have said excavations made of a sum of money sufficient to pay the cost of making the same and of repairing the street, alley, or public way in good condition, which deposit shall be made with the city treasurer and a certificate thereof produced to said engineer. And in addition the person, company, or corporation shall execute a bond to the City of Owensboro with good security conditioned that such person, company or corporation shall make all necessary repairs from time to time where said excavations are made for the period of one year thereafter, and shall also be responsible to said city for any damages and costs against said city that may be recovered by any person on
13 account of said excavation having been made, which bond shall be delivered to and approved by the mayor before any permit to make said excavation shall be granted by said engineer. Provided, that any person, company or corporation may, instead of executing a bond for each excavation as provided in this ordinance, execute one bond which shall be renewed annually, with good and sufficient sureties, before the city clerk, to be attested and approved by him, to keep said excavations in repair for the period of one year, and also to protect the city and save it harmless from all damages and costs that may be recovered against it by any person on account of any excavation or excavations having been made by such corporation, person or company, Provided, however, that bonds be executed under the provisions of this ordinance by all persons, firms, companies or corporations, who carry on the business of plumbing in the City of Owensboro, may be limited to the penal sum of $2,000. (As amended by Ordinance approved August 18, 1902.)

§4. That the permit herein authorized to be issued by said engineer shall be written or printed, and shall be dated the day of its issue, and state the name of the person to whom it is issued, the purpose, place and extent of the proposed excavation, and of the name of the owner or occupant of the premises adjacent and shall have printed thereon said rules and regulations and general plans and specifications. Said permit shall be revoked by said engineer at any time if the person to whom the same is issued shall violate the conditions thereof, which revocation shall be written notice thereof delivered to such person, or, if he is not present, to any other person actually engaged in the work for which said permit was issued, and after

such revocation it shall be unlawful for such person or any
14 person acting for him as agent, employe or otherwise to further proceed with such work.

§5. That whenever any permit granted under the provisions of this ordinance shall be revoked, the city engineer, shall at once notify the mayor of the revocation thereof, and said engineer shall cause all payments, curbing and parts of any street removed to be relaid and repaired, and said street, alley, avenue, sidewalk or public place to be put in as good condition and repair as the same was immediately *proceeding* such excavation, and shall, on completion thereof, make out an itemized statement of the cost thereof and transmit the same to the mayor, who shall deliver the same to the City Clerk, whose duty it shall be to collect the same, and if the same shall not be paid within thirty days after said work, has been done, suit may be instituted therefor by the city attorney in any court of competent jurisdiction; and the surety in said bond shall be responsible for the cost of said excavation and suit may be instituted on said bond therefor.

§6. That it shall be unlawful for any person or persons or any corporation having a permit issued under the provisions of this ordinance to make any of the excavations herein mentioned or to make such excavation or prosecute such work in a manner different from that described in any such permit.

§7. That every person, company or corporation violating any of the provisions of this ordinance shall, on conviction, be fined not less than twenty-five nor more than one Hundred Dollars for each offence.

§8. This ordinance shall go into effect on and after its passage.

Approved November 7, 1901."

15 A duly certified copy of the above ordinance is filed herewith and made part hereof.

Complainant company states that it has at all times and is now, willing to comply with all reasonable rules regulations and conditions which defendant city may in the exercise of its police power, prescribe for the protection of defendant City and its inhabitants against loss, injury or damage by reason of the digging of trenches or making excavations in any street, alley, side walk, or any of the public grounds of said city for the purpose of laying, or taking up, or repairing any of its water pipes, or any of the connections with its water pipes; and it has at all times, and is now, willing to cause all pavements, curbings and parts of any street removed by it in the exercise of its franchise to maintain a water works system in the City of Owensboro, Kentucky, to be relaid and repaired in said street, alleys or avenues, sidewalks, or public places to be put in as good condition and repair as the same was immediately *proceeding* such excavation.

Complaint further states that while it was in the enjoyment of its franchise aforesaid, and carrying out all the provisions of its contract with defendant city, said defendant City unlawfully, wrongfully and in violation of its said contract with this Complainant, and attempt-

ing directly to impair its obligations, on July 6, 1914, enacted a resolution in words and figures as follows, to-wit:

"Whereas the franchise heretofore granted by the city of Owensboro to the Owensboro Water Works Company, permitting said Company to lay pipes and mains in the streets and alleys of said city has expired, and

"Whereas the said Owensboro Water Works Company has now neither the right nor the consent of said city to use the streets, alleys or public highways of said city, therefore "Be it resolved that
16 the mayor be, and he is, hereby authorized and directed to notify the said Owensboro Water Works Company that it must cease to dig up or disturb the streets, alleys or public ways of said city in any way whatsoever; and the said mayor shall take all necessary steps to make said notice and order effective.

"Be it further resolved that the city engineer be, and he is, hereby directed not to grant a permit to dig up or disturb the streets of the city of Owensboro to the Owensboro Water Works Company, nor to any person employed by said company."

A duly certified copy of the above ordinance is filed herewith and made part hereof.

Complainant further states that said ordinance of November 7, 1901, above set out, and said ordinance or resolution of July 6th, 1914, above set out, were each passed without the consent of Complainant and in violation of plaintiff's said contract with the defendant city as herein above set out; and the terms of said ordinance are unreasonable and arbitrary, and in violation of the contract aforesaid, and the passage of said ordinance by defendant city is an impairment of the obligations of said contract existing between complainant Company and defendant city and in violation of the Constitution of the United States and of the Constitution of the State of Kentucky.

Complainant states that defendant City, its Mayor and Common Council and its city engineer are now refusing, under any conditions or circumstances to grant complainant Company any permit to dig any trenches or make any excavations in any of the streets, alleys, sidewalks or public grounds of defendant City for the purpose of laying, taking up or repairing any of its pipes or making any
17 connection with any of its water pipes or repairing any of the connections now existing with its water pipes; and defendant city now claims the right power and authority under the ordinance of November 7, 1901, to prohibit complainant company and its officers and agents from exercising its franchise to maintain a water works system in the City of Owensboro, and are now claiming the right to, and are refusing to allow Complainant Company the privilege of making any excavations in any of the streets, alleys, sidewalks or other public grounds of defendant city, for the purpose of laying, digging up or repairing any of its pipe or water connections, and they are threatening to, and will, unless restrained from so doing by the orders of this court, take out warrants against Complainant Company and its officers and agents and subject Com-

plainant Company and its said officers and agents to prosecutions in the City Court for alleged violations of said ordinance of November 7th, 1901.

And moreover, Complainant states that if defendant City is allowed to enforce the resolution of July 6, 1914, and the ordinance of November 7, 1901, herein set out above, it will result in an impairment of Complainant's contract with defendant City as above set out and would take the property of this Complainant Company without due process of law, and will directly result in denying to this Complainant Company the equal protection of the law and would make it impossible for Complainant Company to operate its water works system in the City of Owensboro, or exercise its franchise therein, and Complainant company would be compelled to abandon its water works system and there would be lost to complainant Company all of its valuable property now owned and maintained by it in said City, for the purpose of furnishing defendant City, and the
18 inhabitants thereof, with water, as it has the right to do under its contract with defendant City, as more particularly set out above.

Complainant further states that great and irreparable injury will result to it unless an injunction against defendant City, its agents, servants, employes, and its officers, is immediately granted; and it says that no previous injunction has ever been asked, or refused, or granted herein by this, or any other court, or any judge, or clerk, or at all.

Wherefore, Complainant seeks the jurisdiction of this Honorable Court to protect it in the full, free and complete enjoyment of its contract rights with defendant city.

Wherefore, the Complainant prays that Your Honor grant unto it a writ of injunction commanding defendant, City of Owensboro, and all persons claiming to act under its authority, or control, to desist and refrain from any effort to enforce the ordinance or resolution enacted by the Mayor and Common Council of defendant City, on Monday, July 6, 1914, and to desist and refrain from in any way interfering with defendant Company in the full, free and lawful exercise of its franchise right to use the streets, alleys and public ways of defendant City for the purpose of laying, taking up or repairing any of Complainant Company's water pipes, or any connections therewith or from interfering with Complainant Company under an ordinance of June 3, 1889, to maintain, complete and operate water works in the City of Owensboro for supplying the City of Owensboro or the inhabitants of said city and its vicinity with water for public and private purposes for and during the existence of the corporate life of Complainant Company, and Complainant prays that upon hearing that the writ of injunction herein prayed for be made
19 and confirmed until the final determination of this suit; and that thereupon said injunction be made perpetual: and complainant further prays for a writ of subpœna against defendant and for all just and equitable relief which to a Court of equity belongs and to which Complainant Company may show itself entitled.

WILLIAM T. ELLIS,
CLARENCE M. FINN,
Attorneys for Complainant.

STATE OF KENTUCKY,
County of Daviess, sct:

James J. Sweeney, being duly sworn, according to law deposes and says, I am the President of the Complainant, Owensboro Water Works Company of Owensboro, Kentucky, in the foregoing bill, and have read said Bill and same is true to my own knowledge, except such matters as are therein stated on information and belief and as to such statements, I believe them to be true.

JAMES J. SWEENEY.

Subscribed and sworn to before be by James J. Sweeney, this the 10th day of December, 1914.

A. G. RONALD, *Clerk.*

20 EXHIBIT No. 1.

Articles of Incorporation.

The undersigned, Samuel A. Miller, Americus F. Callaham, and William Reinecke, all of Louisville, Kentucky, as corporators, have associated themselves their associates and assigns, together, to become and be incorporated as a corporation for transacting the business of a water works company under the provisions of Chapter 56 of the General Statutes of Kentucky, and its amendments; and they have adopted these Articles of Incorporation:

1. The name of the Corporators of the said corporation are the following: Samuel A. Miller, of Louisville, Ky: Americus F. Callaham of Louisville, Ky., and William Reinecke, of Louisville, Ky.

2. The name of said corporation is: The Owensboro Water Works Company of Owensboro, Ky.

3. The principal place of transacting the business of the said corporation is the City of Owensboro, in the County of Daviess, in the State of Kentucky.

4. The general nature of the business proposed to be transacted by the said corporation is to acquire the water works of the Owensboro Water Company, a corporation organized and existing under the laws of the State of Kentucky, and its contracts for supplying the City of Owensboro and its inhabitants with water, and to maintain and operate Water Works in the City of Owensboro, in the County of Daviess, in the State of Kentucky, for supplying the said City of Owensboro and the inhabitants of the said City and its Vicinity with water for public and private purposes;

5. The authorized amount of capital stock of the said corporation is (subject to the power of increase hereinafter mentioned) the sum of Three Hundred Thousand Dollars divided into three thousand shares of one Hundred Dollars each. Five Thousand Dollars thereof are to be paid in cash immediately upon the organization of the said corporation, and two hundred and ninety-five thousand dollars are to be issued in fully paid certificates as a part of the

21 consideration to be paid to the said Owensboro Water Company for the purchase of its water works and contracts. The

Board of Directors may increase the amount of the capital stock from time to time to a total amount not exceeding five hundred thousand dollars.

6. The time of commencement of the said corporation is the first day of June in the year One Thousand Eight Hundred and Eighty-nine, and it shall terminate twenty-five years thereafter, subject to such extensions of its term *at* existance as by law provided.

7. The affairs of the said corporation shall be conducted by a Board of Directors of five Stockholders, and by the following officers: A President; a Vice-President; a Secretary and a Treasurer. The Board of Directors for the first year shall consist of Samuel A. Miller, John Long, Americus F. Callaham, William Reinecke, and Henry P. Martin. Annuel elections of the Board of Directors shall take place at the annual meeting of the said corporation on the first Saturday in June of each and every year, beginning with the year 1890. The officers shall be elected by each Board of Directors as soon as convenient after the election of the respective Board for the term of the said Board.

8. The highest amount of indebtedness or liability direct or contingent, to which the said corporation is at any time to subject itself, or to be subject, shall not exceed two-thirds of the capital stock.

9. Among the powers of the said corporation shall be the following: To have perpetual succession; to sue and be sued by the corporate name; to have a common seal and to alter the same at pleasure; to render the shares and interest of the stockholders transferable; to prescribe the mode of making such transfers; to exempt the private property of members from liability for corporate debts; to make contracts, acquire and transfer property, possessing the same power in such respects as private individuals now enjoy; to establish by-law, and make all rules and regulations deemed expedient for the
22 management of the affairs of the said corporation not inconsistent with the constitution or laws of this State or the United States.

10. The private property for the corporators and stockholders is to be exempt from the corporate debts.

Witness the hands of the said corporators, this thirtieth day of May in the year One Thousand eight hundred and eighty-nine.

SAMUEL A. MILLER.
AMERICUS F. CALLAHAM.
WILLIAM REINECKE.

STATE OF KENTUCKY,
Jefferson County, sct:

I, Geo. H. Webb, Clerk of the County Court of Jefferson County in the State of Kentucky, do hereby certify that on this day the foregoing Articles of Incorporation were produced to me in my office and acknowledged, and delivered by Saml. A. Miller, Americus F. Callaham, and Wm. Reinecke, parties thereto, to be their act and deed, all of which is hereby certified to the proper office for record.

Witness my hand this 1st day of June, 1889.

GEO. H. WEBB, *Clerk,*
By W. E. BUCKEL, *Deputy Clerk.*

STATE OF KENTUCKY,
Daviess County, sct:

I, M. S. Mattingley, Clerk of the Daviess County Court do hereby certify that the foregoing Articles of Incorporation of the Owensboro Water Works Company were this day lodged in my office, certified as above and together with the foregoing and this certificate duly admitted to record.

Witness my hand this June 3", 1889.

M. S. MATTINGLEY, *Clerk,*
By R. A. HAGAN, *D. C.*

See Deed Book 49, page 441.

A Copy:

Attest:
JAMES WEIR, *Clerk,*
By CALEB WARE, *Deputy Clerk.*

23 EXHIBIT No. 2.

Amended Articles of Incorporation of the Owensboro Water Works Company of Owensboro, Kentucky.

The undersigned, being a majority of the directors of the Owensboro Water Works Company of Owensboro, Kentucky; having been duly authorized thereto in writing by the owners of more than two-thirds of the capital stock in said company (which writing so authorizing them has been duly executed by said stockholders and is now on file in the office of said Company, the said Company having heretofore accepted the provisions of the present Constitution of the Commonwealth of Kentucky; do hereby adopt the following articles of Incorporation, amendatory of the original articles of Incorporation of the Owensboro Water Works Company of Owensboro, Kentucky, dated the 30th day of May, 1889, and recorded in the Clerk's Office of the Daviess County Court, in Deed Book, 49, page 441, and said directors do hereby amend article 6 of said original articles of incorporation, and do hereby extend the life of said corporation, the Owensboro Water Works Company of Owensboro, Kentucky, for the period of Twenty-five years, from the first of June, 1914, so that said section, as amended, shall read: "6th. the time of the commencement of said corporation is the first day of June, 1889, and it shall terminate twenty-five years thereafter, subject to such extensions of its term as by law provided, and same is now, by these amended articles of incorporation, extended for the period of twenty-five years from, and after the 1st day of June, 1914.

In testimony whereof witness our hands, this the 6th day of May, 1914.

E. T. FRANKS.
J. T. GRIFFITH.
JAS. J. SWEENEY.
H. B. THOMPKINS.

24 STATE OF KENTUCKY,
County of Daviess, sct:

I, Texanna Cottrell, a notary Public for Daviess County, with a seal, do certify that on this day appeared before me, E. T. Franks, J. T. Griffith and H. B. Thompkins and Jas. J. Sweeney who acknowledged the foregoing articles of Incorporation to be their act and deed.

Given under my hand this 6th day of May, 1914.

[SEAL.] TEXANNA COTTRELL,
A Notary Public in and for Daviess County, Ky.

My Commission expires on the 3rd day of March, 1918.

STATE OF KENTUCKY,
Daviess County, sct:

And on this day the same was lodged and together with this and the foregoing certificate duly recorded in my office.

Witness my hand this 6" day of May, 1914.

JAMES WEIR, *Clerk.*

See Inc. Book No. 3, page 69.

A Copy:

Attest:
JAMES WEIR, *Clerk,*
By CALEB WARE, *D. C.*

25 EXHIBIT No. 3.

COUNCIL HALL, Monday, June 3rd, 1889.

"The following ordinance was submitted and read, whereupon on motion the rules of order were suspended as to voting on ordinances and the same, after its second reading, was enacted by the following vote, to-wit: Ayes, Messrs. Baer, Vargason, Higdon, Cullen, Decker. Noes, None.

"Whereas the Owensboro Water Works Company, of Owensboro Kentucky, a corporation duly organized and existing under the laws of the State of Kentucky is ready to purchase the water works of the Owensboro Water Company, together with its existing contracts for supplying the City of Owensboro and the inhabitants of said city and its vicinity with water, and whereas, it is desired by the said two companies in order that the said purchase may be consummated, that the City of Owensboro grant to the said The Owensboro Water Works Company, of Owensboro, Kentucky, the franchises and license to maintain, complete and operate water works in the city of Owensboro and to use the streets, alleys and other public highways within the said city for laying, repairing and taking up mains, service pipes, hydrants and other apparatus for the supply of water, and that the City of Owensboro accept the said The Owensboro Water Works Company, of Owensboro, Kentucky, as the successor to the contracts made

by the City of Owensboro, with the Owensboro Water Company for hydrant rentals; now in order to enable the said companies to carry out their negotiations, and to vest the contracts of the Owensboro Water Company for hydrants as fully in the said The Owensboro Water Works Company, of Owensboro, Kentucky, as if they had been originally made by the City of Owensboro with the said The Owensboro Water Works Company, of Owensboro, Kentucky.

26 Be it ordained by the Common Council of the City of Owensboro:

"Sec. 1. That in consideration of the purchase by the Owensboro Water Works Company, of Owensboro, Kentucky, of the water works of the Owensboro Water Company, the franchise and license are hereby granted to the Owensboro Water Works Company, of Owensboro, Kentucky, and to its successors and assigns, for and during the existence of the said corporation, to maintain, complete and operate water works in the city of Owensboro for supplying the city of Owensboro and the inhabitants of said city and its vicinity with water for public and private purposes, and to use within the present and future limits of the city of Owensboro, the streets, alleys and other public highways thereof for the purpose of laying, repairing and taking up mains, service pipes, hydrants, and other apparatus for the supply of water.

"But there shall be no continued unreasonable obstruction of the said streets, alleys and other public highways, and after their use from time to time, they shall be restored by the said water works company as near as practicable to their former condition; and the said grant is subject to the existing right of purchase of the said water works by the said City of Owensboro.

"Sec. 2. That, in like consideration of the said purchase, by the Owensboro Water Works Company, of Owensboro, Kentucky, of the water works of the Owensboro Water Company, the City of Owensboro Kentucky, as the successor to the contract for hydrant rental now existing between the City of Owensboro and the Owensboro Water Company as fully as if such existing contracts had been originally made by the City of Owensboro with the said The Owensboro Water Works Company, of Owensboro, Kentucky, without the intervention of the said Owensboro Water Company.

27 "Sec. 3. That the consent of the City of Owensboro is hereby given to the consummation of the said purchase of the said water works of the Owensboro Water Company by the Owensboro Water Works Company of Owensboro, Kentucky, and upon such consummation the mayor and city clerk of the city of Owensboro are hereby authorized and instructed to seal duplicate copies of the ordinance with the seal of the City of Owensboro, and to sign such copies as a contract between the City of Owensboro and the Owensboro Water Works Company, of Owensboro, Kentucky, and to deliver one of such copies so signed and sealed to the Owensboro Water Works Company of Owensboro and to accept the other in behalf of the city of Owensboro, when signed and s-aled by the said The Owensboro Water Works Company of Owensboro, Kentucky.

"Sec. 4. This ordinance shall take effect at its passage and publication.

"JOE LEE, *Mayor.*"

"PHIL R. ZULAUF, *Clerk.*"

28 COMMONWEALTH OF KENTUCKY,
City of Owensboro, sct:

I, W. A. Wahl, Clerk of the City of Owensboro, State of Kentucky, do certify that the foregoing three pages contain a true copy of an ordinance relative to the purchase by the Owensboro Water Works Co. of the Owensboro Water Company as the same appears from the record of my office, of which records I am the legal custodian.

Given under my hand and seal of the City of Owensboro, this 10th day of July, A. D. 1914.

[SEAL.]

W. A. WAHL,
City Clerk.

29 "An Ordinance Concerning Excavations in Streets, Alleys, Public Places, Tapping Sewers, Making Gas and Water Connections.

"Be it ordained by the Common Council of the City of Owensboro:"

§1. That it shall be unlawful for any person or persons or any corporation, or any servant or employe of any person or corporation, to dig any trench or make any excavation in any streets, alley, avenues, or sidewalk, or any of the public grounds, of said city, for the purpose of laying, taking up on repairing any drain pipe, sewer, or any connection, with any water pipe, gas pipe, or other pipes or repair of street car tracks, or other purpose in the city of Owensboro without first having obtained a written permit to do so as hereinafter provided, and without having first made the deposit and executed the bond hereinafter required.

§2. That it shall be the duty of the Mayor and City engineer to determine whether any of the excavations mentioned in the first section of this ordinance are necessary to be made, and if it is decided that they may be made, the engineer shall then prescribe in writing the manner in which they shall be made and the place at which the same shall be made and fix the time of making the same, and issue a permit therefor, and shall supervise and control the making of the same, and none of the excavations mentioned in the first section shall be made until such permit shall be obtained from the city engineer. Said engineer, shall, with the consent and approval of the council, prescribe rules and regulations and general plans and specifications applicable to all such work, and all such work shall be done in strict accordance therewith.

§3. That before any permit shall be issued to any person, company, or corporation to make any of the excavations mentioned
30 in the first section of this ordinance, a deposit shall be made by the person, company or corporation desiring to have said

excavations made of a sum of money sufficient to pay the cost of making the same and of repairing the street, alley, or public way in good condition, which deposit shall be made with the city treasurer and a certificate thereof produced to said engineer. And in addition thereto the person, company or corporation shall execute a bond to the City of Owensboro with good surety conditioned that such person, company or corporation shall make all necessary repairs from time to time where said excavations are made for the period of one year thereafter, and shall also be responsible to said city for any damages and costs against said city that may be recovered by any person on account of said excavation having been made, which bond shall be delivered to and approved by the mayor before any permit to make said excavation shall be granted by said engineer. Provided, that any person, firm, corporation, or company now existing instead of executing a bond for each excavation as provided in this ordinance, execute one bond which shall be renewed annually, with good and sufficient sureties, before the city clerk, to be attested and approved by him, to keep said excavations in repair for the period of one year, and also to protect the city and save it harmless from all damages and costs that may be recovered against it by any person on account of any excavation or excavations having been made by such corporation, person or company.

§4. That the permit herein authorized to be issued by said engineer shall be written or printed, and shall be dated the day
31 of its issue, and state the name of the person to whom same is issued, the purpose, place and extent of the proposed excavation, and of the name of the owner or occupant of the premises adjacent and shall have printed thereon said rules and regulations and general plans and specifications. Said permit shall be revoked by said engineer at any time if the person to whom the same is issued shall violate the conditions thereof, which revocation shall be written notice thereof delivered to such person, or, if he is not then present, to any other person actually engaged in the work for which said permit was issued, and after such revocation it shall be unlawful for such person or any person acting for him as agent, employe or otherwise to further proceed with said work.

§5. That whenever any permit granted under the provisions of this ordinance shall re revoked, the city engineer, shall at once notify the mayor of the revocation thereof, and said engineer shall cause any excavations made to be filled up and shall cause all pavements, curbing and parts of any street removed to be relaid and repaired, and said street, alley, avenue, sidewalk or public place to be put in as good condition and repair as the same was immediately preceding such excavation, and shall, on completion thereof, make out an itemized statement of the cost thereof and transmit the same to the mayor, who shall deliver the same to the city clerk, whose duty it shall be to collect the same, and if the same shall not be paid within thirty days after said work has been done, suit may be instituted therefor by the city attorney in any court of competent jurisdiction; and the surety in said bond shall be responsible for

the cost of said excavation and suit may be instituted on said bond therefor.

§6. That it shall be unlawful for any person or persons or any corporation having a permit issued under the provision of this ordinance to make any of the excavations herein mentioned or to make such excavation or prosecute such work in a manner
32 different from that described in any such permit.

§7. That every person, company, or corporation who shall violate any of the provisions of this ordinance shall, on conviction thereof, be fined not less than twenty-five and not exceeding one hundrded dollars for each offense.

§8. This ordinance shall go into full force and effect on and after its final passage.

Approved November 7th, 1901.

W. P. SMALL, *Mayor.*

Attest:
W. M. O'BRYAN,
City Clerk.

COMMONWEALTH OF KENTUCKY,
City of Owensboro, sct:

I, W. A. Wahl, Clerk of the City of Owensboro, State of Kentucky, do certify that the foregoing four pages contain a true copy of an ordinance concerning the excavations in streets, alleys, Public places, Tapping Sewers Making gas and Water Connections, as the same appears from the records of my office, of which reports I am the legal custodian.

Given under my hand and seal of the City of Owensboro, this 10th day of July, A. D. 1914.

[SEAL.]

W. A. WAHL,
City Clerk.

33 COUNCIL HALL, July 6th, 1914.

At a meeting of the Common Council of Owensboro, held in said City on July 6th, 1914, the following resolution was passed to-wit:

"Whereas the franchise heretofore granted by the city of Owensboro to the Owensboro Water Works Company permitting said company to lay its pipes and mains in the streets and alleys of said city has expired, and

"Whereas the said Owensboro Water Works Company has now neither the right nor the consent of said city to use the streets, alleys or public highways of said city, therefore,

"Be it resolved that the Mayor, be and he is, hereby authorized and directed to notify the said Owensboro Water Works Company that it must cease to dig up or disturb the streets, alleys or public ways of said city in any way whatsoever; and that said mayor shall take all necessary steps to make said notice and order effective.

"Be it further resolved that the city engineer be, and he is, hereby directed not to grant a permit to dig up or disturb the streets of the

city of Owensboro to the Owensboro Water Works Company, nor to any person employed by said company."

JAMES H. HICKMAN, *Mayor.*

Attest:
WILL WAHL, *Clerk.*

COMMONWEALTH OF KENTUCKY,
City of Owensboro, sct:

I, W. A. Wahl, Clerk of the City of Owensboro, State of Kentucky do certify that the foregoing one page contain- a true copy of
a resolution passed by Council July 6, 1914 relative to dig-
34 ging up streets, etc., as the same appears from the records of my office, of which records I am the legal custodian.

Given under my hand and seal of the City of Owensboro, this 10th day of July, A. D. 1914.

[SEAL.]

W. A. WAHL,
City Clerk.

An Ordinance Amending an Ordinance Entitled "An Ordinance Relating to Making Excavations in the Streets, Alleys, and Public Places, and Tapping Sewers and Making Gas and Water Connections in the City of Owensboro," approved November 7th, 1901.

Be it ordained by the Common Council of the City of Owensboro:

Sec. 1. That section three of an ordinance entitled "An ordinance relating to making excavations in the streets, alleys and public places, and tapping sewers and making gas and water connections in the city of Owensboro," approved November 7th, 1901, be amended as follows:

Provided, however, that bonds executed under the provisions of this ordinance by all persons, firms, companies or corporations, who carry on the business of plumbers in the City of Owensboro, may be limited to the penal sum of Two Thousand Dollars.

Sec. 2. That this ordinance shall go into effect from and after its final passage.

Approved—August 18th, 1902.

MARTIN YEWELL, *Mayor.*

34½ Attest:
W. M. O'BRYAN,
City Clerk.

COMMONWEALTH OF KENTUCKY,
City of Owensboro, sct:

I, W. A. Wahl, Clerk of the City of Owensboro, State of Kentucky, do certify that the foregoing one page contain- a true copy of an ordinance amending an ordinance approved Nov. 7, 1901, concerning the making of excavations in the streets, etc., as the same appears from the records of my office, of which records I am the legal custodian.

Given under my hand and seal of the City of Owensboro, this 10th day of July, A. D. 1914.

[SEAL.]

W. A. WAHL,
City Clerk.

Stipulation.

Filed November 21st, 1914.

It is stipulated by and between the parties hereto, by their respective counsel, that the time fixed in the subpœna herein and by law at which the answer of defendant, City of Owen-boro, was due, and should have been filed, was and is specially waived by complainant, The Owensboro Water Works Company of Owens-
35 boro, Kentucky, and it is agreed that answer may be filed on or before November 23rd, 1914; but the extension of time for the filing of said answer shall not delay the final hearing of this cause; and this case shall be heard at the present term of this court, or at such time as the court may designate; and the parties hereto consent that said court may hear this couse at Louisville, Kentucky, upon such date as may be fixed by the court.

It is further stipulated that complainant may file motions to strike from the answer of defendant, if it so desires, and said motion to strike shall be heard and determined by the court upon the final hearing of this cause.

Counsel for complainant have been furnished a copy of the answer to be filed herein, and they acknowledge receipt of same.

Owensboro, Kentucky, November 21st, 1914.

OWENSBORO WATER WORKS COMPANY, OF OWENSBORO, KENTUCKY,
Complainant.

By WM. T. ELLIS,
C. M. FINN,
Counsel.

CITY OF OWENSBORO,
By GEO. S. WILSON,
LE VEGA CLEMENTS,
BEN D. RINGO,
Counsel.

36 *Answer.*

Filed November 21st, 1914.

The defendant City of Owensboro admits that the Owensboro Water Works Company of Owensboro, Kentucky, the complainant herein, is a corporation created and doing business as set forth in its Bill herein; that its original Articles of Incorporation were signed, acknowledged and lodged for record on June 3rd, A. D. 1889, in the County Clerk's office in Daviess County Kentucky, and

duly recorded therein, and a properly certified copy thereof filed with the Secretary of State for the Commonwealth of Kentucky.

Defendant admits that by the terms of the said Articles of Incorporation of the complaina-t herein it is provoded that said corporation should terminate in twenty-five years from and after the date of its incorporation; and that by and with the written consent of more than three-fourths of the stockholders of complainant Company, its Board of Directors, on May 6th, 1914, did sign, execute and acknowledge Amended Articles of Incorporation and file same in the County Court Clerk's office of Daviess County, Kentucky, and a copy thereof to the Secretary of State for Kentucky wherein and whereby the corporate life of complainant Company was extended by such amendment to its Articles of Incorporation for a period of twenty-five years from and after June 1st, 1914, and that the complainant Company is now a body corporate under the
37 General Corporation laws of the State of Kentucky.

It is admitted further that the defendant City of Owensboro is a municipal corporation and is a corporation organized, created and existing under the laws of the State of Kentucky, as a City of the third class therein, and in the manner and form as set out in complainant's bill.

Defendant City admits that by act of February 16th, 1866, and by act of March 6, 1876, the Common Council of the City had conferred upon and vested in it full power to make, establish and regulate wells, cisterns, reservoirs and pumps and to provide for the furnishing of the said City and the inhabitants thereof with water, and to provide by contract for the construction, maintenance and operation of a system of water works in said City for said purposes and to grant to others the privilege of maintaining and operating such a system of water works and for such purposes, and admits that all of said powers were continued and remained vested in the Common Council of defendant City by and under the act of March 18, 1882.

Defendant city admits that by Articles of Incorporation duly executed and recorded, as set forth in the Bill herein, there was created on the 9th day of September, 1878, a corporation known as "Owensboro Water Company" and it had conferred upon it by law and by its Articles of Incorporation all the power and authority as set forth in the complainant's Bill herein.

The defendant City admits that on the 10th day of September, 1878, being thereunto fully authorized and employed so to do, it made and entered into a contract with the said Owensboro Water Company wherein it granted to the said Water Company, its successors and assigns, the right, privilege and franchise to construct and operate in the city of Owensboro a system of water works and the right and franchise to use the streets, alleys and other public ways within said City, or its future limits, for the purpose of laying its
38 pipes, conduits, hydrants and fountains for the supply of water, and for the purpose of repairing said pipes, conduits, hyrdants and fountains so maintained in the streets, alleys and other public places within said city, but said contract, privilege, grant and franchise were specifically limited by the terms thereof and of the

Ordinance of the defendant City passed in that regard to a period of twenty-five years from and after the passage of said Ordinance on September 10, 1878, as will fully appear from paragraph II of this answer and from a duly certified copy of said ordinance of September 10, 1878, which is filed herewith as a part hereof, marked "Exhibit J".

The defendant City admits that on June 3rd, 1889, the City of Owensboro had greatly increased in population and territory; but denies that it was then necessary that large extensions or improvements, or either, should be made in said water works system in said city for the purpose of supplying said City, or the inhabitants thereof, with water, or to this end the complainant, The Owensboro Water Works Company, was incorporated; denies that the Owensboro Water Company was authorized by defendant City to sell or transfer all or any of its property to The Owensboro Water Works Company, of Owensboro; denies that in order to induce said Owensboro Water Works Company to purchase the water works system of the Owensboro Water Company, or to make any necessary or other extensions or improvements in said water works system, or at all, the Mayor and Common Council of defendant City on June 3rd, 1889, or at any time, entered into any contract with complainant Company wherein or whereby defendant City granted to complainant Company, or its successors, or assigns, for or during the existence of complainant
Company, any franchise, license or privilege to maintain,
39 complete or operate a water works system in the City of Owensboro, or to use the streets, alleys, or other public highways within said City for laying, repairing or taking up its mains, service pipes, hydrants, or other apparatus for supplying the City of Owensboro or the inhabitants thereof, with water, and denies that the Mayor and Common Council of the defendant City on June 3rd, 1889, or at any time, entered into any contract with the complainant Company, or its successors or assigns, except that by ordinance passed on the date the defendant City consented to the sale and transfer of all the rights, privileges, contracts and franchises which it had theretofore granted the Owensboro Water Company by its ordinance heretofore referred to as "Exhibit J", and the ordinance consenting to said sale and transfer of the rights of the Owensboro Water Company to the Owensboro Water Works is fully set out and copied in Complainant's Bill herein, and a certified copy thereof is filed with said Bill as "Exhibit #3", and being the same ordinance hereinafter referred to and explained in this answer.

The defendant City admits that after the said ordinance of June 3rd, 1889 was adopted by the Mayor and Common Council of defendant City Complainant accepted said ordinance and the grant therein contained, and admits that the complainant Company purchased the water works of the Owensboro Water Company and has from time to time extended said water works system, but it says that no privileges or franchises were granted by said ordinance except only the privilege and right of complainant to purchase and conduct the plant, business and rights of the Owensboro Water Company according to the grant of privileges and right originally extended by

defendant city to the said Owensboro Water Company under the ordinance of September 10th, 1878, above referred to; it
40 admits that complainant Company owns, operates and maintains a water works system in the City of Owensboro, but denies that same is fully equipped, or equipped at all, to furnish the City of Owensboro, or the inhabitants thereof, with wholesome water, or that it does do so. It denies that when said ordinance was accepted by complainant company it then and thereby became, was or is an irrepealable contract between the complainant Company and the defendant City.

Defendant City of Owensboro denies that by the ordinance referred to and with the complaint and marked "Exhibit #3, or by the preamble thereof, or at all, this defendant did grant to the complainant Company, or to its successors or assigns, or at all, for or during the existence of said Complainant Company or for any time beyond the existence of the Owensboro Water Company the franchise or license to maintain, complete or operate a water works system in the City of Owensboro; or did grant to complainant Company any franchise or license to use within the present or future limits of defendant city the streets, alleys, or other public ways thereof for the purpose of laying repairing or taking up mains, service pipes, hydrants, or other apparatus for the supply of said water, or did grant any such franchise or license to complainant Company at all, or for any purpose; denies that said contract, or any contract, so to use the streets, alleys or other public highways of defendant City for the purpose of laying, repairing or taking up mains, service pipes, hydrants or other apparatus, or any such contract between the complainant and this defendant is now in full force or effect, or is in force and effect at all, or will continue in full force or effect for and during the existence of complainant Company, or for any time whatever, defendant denies that it has not power, right or authority to alter, abridge, or repeal said ordinance of June 3rd, 1889, or
41 to alter or abridge any of the contract rights therein vested in complainant company for and during its corporate existence, and denies that any such rights were or are vested in complainant Company for or during its corporate existence, or are vested in complainant Company at all.

The defendant City says that it has not any knowledge or information sufficient to constitute a behalf as to whether or not complainant Company has a capital stock of $300,000.00, or any sum, or whether said sum, or any part thereof, has been invested in the purchase from the Owensboro Water Company of its water system or invested in improving, extending or reconstructing said water works system and for want of knowledge and information it denies each of these allegations; defendant City has not knowledge or information sufficient to constitute a belief as to whether or not the complainant Company has issued first-mortgage bonds upon its property to the amount of $250,000.00, or any sum whatever, or whether any of said bonds are outstanding or unpaid, or whether complainant Company has invested the funds received by it from the sale of said bonds, or any part thereof, in the extension, reconstruc-

tion or equipment of its said water works system, and denies that the complainant Company has now a very valuable plant or that its plant is fully equipped or equipped at all to furnish the city of Owensboro, or the inhabitants thereof, with wholesome water, or any water, and denies that its property referred to in its complaint is worth $250,000.00, or any sum above $25,000.00, and denies that the amount in controversy herein is as much as $3,000.00 in value, exclusive of interest and cost.

Defendant City admits that on November 7, 1901, its Mayor and Common Council passed an ordinance and approved as of that date and that same is now in full force and effect in said
42 City and is substantially in words and figures as set out in the complaint herein and filed therewith.

Defendant City admits that on July 6, 1914, by its Mayor and Common Council it enacted a resolution or ordinance substantially in words and figures as set out in complainant's Bill and filed therewith, but denies that at the time it did so, or at this time, the complainant was in the enjoyment of any franchise granted to it by this defendant, or was carrying out all or any of the provisions of its contract with the defendant, or that it had any contract with the defendant or that defendant city unlawfully, or wrongfully, or in violation of any such alleged contract with the complainant or in attempting directly, or at all, to impair its obligations, or that it owed or was under any obligation to the complainant herein at the time said resolution or ordinance was passed as aforesaid.

Defendant admits that the ordinance of date November 7, 1901, and also the ordinance of July 6, 1914, as set out in complainant's Bill, were each passed without the consent of the complainant; but denies that each, or either, of said ordinances was, or is, in violation of complainant's contract with said defendant City, or that complainant has or had any contract with said City at the time the ordinance of July 6, 1914, was enacted, and denies that the terms of said ordinances, or either of them, were or are unreasonable or arbitrary or in violation of any contract or the passage thereof was or is an impairment of any obligations of any contract existing between complainant Company and defendant City, or that any contract existed or now exists between complainant Company and defendant City, or that said Ordinances, or either of them, was or is in violation of the Constitution of the United States, or the Constitution of the State of Kentucky.

Defendant admits that it, together with the Mayor and
43 Common Council and its City Engineer are now refusing under any conditions or circumstances to grant complainant company any permit to dig any trenches or make any excavations in any of the streets, alleys, sidewalks or public grounds of the defendant City for the purpose of laying, taking up or repairing any of its water pipes or making any connection with any of its water pipes, or repairing any of the connections now existing with its water pipes; and defendant city now claims the right, power and authority to prohibit complainant company and its officers and agents from exercising any alleged franchise to maintain a water works system in the

City of Owensboro, for the reason that defendant City denies the existence of any such franchise or right of the Complainant Company to operate a water works in the City of Owensboro; defendant admits that it and its Mayor and Common Council and its City Engineer are claiming the right to and are refusing to allow complainant Company the privilege of marking any excavations in any of the streets, alleys, sidewalks or other public grounds of defendant City for the purpose of laying, taking up or repairing any of its pipe or water connection for any purpose, and admits that it will after a reasonable time, unless restrained from so doing by the orders of this Court, take out warrants against complainant company and its officers and agents and subject complainant Company and its said officers and agents to prosecutions in the City Court, for violation of the ordinances protecting the streets and public ways of defendant city.

The defendant denies that if it be allowed to enforce the resolution of July 6, 1914, or the ordinance of November 7, 1901, it will result in any impairment of complainant's contract with defendant City, or that complainant has any contract with defendant City; or would take the property of complainant Company without due process of law, or would take the property of complainant
44 Company at all, or will directly, or at all, result in denying to Complainant the equal protection of the law, or would make it impossible for complainant Company to operate its water works system in the City of Owensboro or to exercise its alleged franchise therein, or that complainant Company would be compelled to abandon its water works system, or that there would be lost to complainant Company all, or any, of its valuable property, or that it has any valuable property owned or maintained by it in said City, and denies that it has any right so to exercise any such alleged franchise, or to operate its water works system in said City under any contract with defendant City, or at all; denies that great or irreparable injury will result to complainant unless an injunction against defendant city, its agents, servants, employes and other officers is immediately granted.

II.

For its further answer the defendant City of Owensboro states that on September 10th, 1878, there was duly passed and enacted by the Mayor and City Council of the City of Owensboro an ordinance, the purpose and intention whereof was to grant to the Owensboro Water Company, which was then and there a corporation organized and existing under the laws of the State of Kentucky, the privilege to construct and operate in the said City a system of water works for supplying to the inhabitants of the City water from the Ohio River. It was specially ordained and enacted by said City Council under Section 1 of said ordinance that the privilege there granted should be for and during the duration of said Owens-
45 boro Water Company and not longer, and by said grant of said privilege the said Mayor and City Council granted to said corporation the said privilege or right until the expiration of the charter under which the said Owensboro Water Company then

existed, which was for a period of twenty-five years from the date of its incorporation, and no longer. This period of the grant and the time limit thereon was well understood and agreed upon by the contracting parties, the defendant City and the Owensboro Water Company, at the time said ordinance was passed, and the reasons for fixing the period or the term of the duration of said franchise clearly appears in Section 13 of said ordinance, which specifically shows that the contracting parties understood what was meant by the duration as set out in the first section of said ordinance and specifically limits said franchise to a period of twenty-five years from any after the passage of the ordinance. The ordinance aforesaid passed as aforesaid by the officers of defendant city on September 10, 1878, was and is in words and figures as follows, to-wit:

September 10th, 1878.

Be it ordained by the Mayor and City Council of Owensboro:

Sec. 1. That the privilege is hereby granted to the Owensboro Water Company, a corporation organized under the laws of the State of Kentucky, and to its successors, and assigns, for the duration of the said Company to construct and operate in the City of Owensboro Water Works for the supply of said City and the inhabitants thereof with water from the Ohio River for public and private purposes, and to use the streets, alleys and other public highways within the present and future limits of said city for the purpose of laying and repairing pipes, conduits, hydrants and fountains for the supply of water. But there shall be no continued unreasonable obstruction of the said streets, alleys and other public highways, and they shall be restored by said Company as near as practicable to their former condition. All other property of said Company shall be located on private grounds.

Sec. 2. The said water Works shall be constructed upon the plan of pumping water into the pipes system directly from the Ohio River, but after the expiration of two years from the completion of
46 said works, upon being required to do so by a vote of two-thirds of the members of the City Council the said company shall erect a stand pipe of the size and character hereinafter mentioned.

Sec. 3. The power and capacity of said works shall be sufficient to throw four streams of water at one time over the roof of any house now in the line of the eight-inch pipe; or to throw three streams of water at one time over the roof of any house now on the line of the six-inch pipe; or to throw two streams of water at one time over the roof of any house now on the line of the four-inch pipe; each stream to be from a separate hydrant through five hundred feet of two and one-half-inch hose and a *nozel* of one and one-quarter inch in diameter. The said Company shall at all times be ready, unavoidable accidents excepted, to supply a sufficient quantity of water for the necessities of public and private use, to keep all hydrants rented of it by said City in good repair and ready for instant use in extinguishing fires by the fire department of said City, and to furnish

direct pressure from the pumps when a fire alarm is given to the party in charge of the pumping machinery.

Sec. 4. When any hydrants or fountains rented of said Company by said City shall be out of repair, and said company shall neglect or fail, within a reasonable time after a written notice by said City, to put same into thorough repair and good working order the said city shall not be liable for any rent of such hydrant or hydrants, fountain or fountains, during the time the same shall continue to be out of repair after such notice.

Sec. 5. In the event of a failure by reason of wilful neglect and mismanagement of said company, to supply a sufficient quantity of water to the said fire department, the said city shall not be liable for any rent of hydrants and fountains during the time of such failure. And the hydrants rented by the said city shall be used by it only for the extinguishing of fires and for washing between the hours of ten and eleven o'clock a. m., the public sewers and gutters and the city wharf, not exceeding one hour during any one day, and two streams only shall be thrown in washing at one and the same time.

Sec. 6. The pump house of said company shall be built of brick and shall be of handsome design and finish, with a brick smokestack seventy-five feet high above the ground, and shall be of sufficient size to accommodate the operative machinery of said company. There shall be two steam pumps of the most approved construction, having a capacity when working together to pump two million gallons of water in twenty-four hours. To each shall be attached one of sulkey's patented condensers, and there shall be two steam boilers of sufficient size, each attached to its respective pump.

47 In the event that the said company shall be required to build a stand pipe, the stand pipe shall be constructed of wrought iron plates, riveted together, twenty feet in diameter and one hundred feet high, upon a foundation of brick or stone, laid in cement. The pipe system shall be in the following streets, viz:

In Main Street from Pearl to Walnut Streets.....	4200 feet
In Third Street from Pearl to Walnut Streets.....	4200 feet
In Fourth Street from Center to Walnut Streets.....	4500 feet
In Seventh Street from Center to Walnut Streets.....	4800 feet
In Walnut Street from Main to Seventh Streets.....	2800 feet
In Locust Street from Fourth to Seventh Streets.....	1800 feet
In Frederica Street from Main to Seventh Streets.....	2800 feet
In Crittenden Street from Main to Seventh Street-....	2800 feet
In Center Street from Fourth to Seventh Streets.....	1800 feet
In Pearl Street from Main to Fourt- Streets.....	800 feet
Total about.....	30600 feet

The said pipe shall be of cast iron, warranted to withstand a hydrostatic pressure of 250 pounds per square inch, cast on end in flasks, free from any flaws or defects and coated with Dr. Smith's patent coal tar varnish. There shall be one cross, one tee, and one fire-hydrant, having two discharge nozzles at each intersection of streets, with a sufficient number of stop valves, protected by iron boxes, to

form a complete cut off system for said works. The nozzels of the hydrants shall be made to fit the hose now in use by the said fire department.

Sec. 7. The said pump house and its appurtenances shall be located within the corporate limits of the said city if the council so desire, and the water to supply the said city and its inhabitants shall be taken by said Company from the Ohio River at a point above the present drainage of sewers of said City.

48 Sec. 8. Should the said city adopt a fire alarm telegraph or telephone the said company shall convey at its expense the wires from its pump house for the length of not exceeding one thousand feet to the nearest box or station, and shall connect the wires at the pump house with some suitable device to produce alarm signals.

Sec. 9. The said company shall have the power and authority to make and enforce as part of the conditions upon which it will supply water to its consumers, all needful rules and regulations, not inconsistent with the laws or the provisions of this ordinance.

Sec. 10. The said City will adopt and enforce ordinances protecting the said company in the safe and unmolested exercise of these franchises, and against fraud and imposition, and against injury, to the hydrants, and fountains rented by it to said city and against waste of water by consumers.

Sec. 11. The said Company shall commence in good faith the construction of said work within thirty days after the passage of this ordinance, and shall continuously and dilligently prosecute said construction until the completion and successful operation of the same; in default whereof the city council may by a vote of two-thirds of its members declare the contract of said city for the payment of said fire service to be forfeited and void.

Sec. 12. The said city shall have the option and privilege at any time after the expiration of ten years from the passage of this ordinance, to purchase the said water works with all the properties and franchises, the price to be ascertained in the following manner; Three disinterested persons of good intelligence, not residents of Owensboro, *of* of Daviess County, Kentucky, shall be chosen one of them by the said city, another by said company, and the third by the first two; and the three or their majority shall make an award, to the amount of which shall be added ten per centum thereof; and the said city shall have the option of refusing to purchase after the said award shall have been made, or to pay to said company in cash within three months from date of said award the said award and in addition the said ten per centum; but in that event the said city shall assume as a part of the sum to be paid and shall pay the bonded and floating indebtedness of said company.

Sec. 13. In consideration of the benefits which will be derived by the said city and its inhabitants by the construction and operation of said water works and in further consideration of the risk of so large an investment by said company in said city in a new and untried enterprise, the rights, privileges and franchises hereby granted to and vested in said company shall remain in force and effect for twenty-

five years from the passage of this ordinance, and the said company shall be exempt from the payment of all taxes which shall be assessed or levied for the use or benefit of the said city for two years from the passage of this ordinance and the said city hereby rents of
49 the said company for the uses hereinbefore set out one fire hydrant at each intersection of streets along the lines of pipe hereinbefore mentioned in all sixty-one hydrants, for and during the term of twenty-five years from the passage of this ordinance, and agrees and binds itself to pay therefor to said company as follows, to-wit: For the first fifty hydrants at the rate of seventy-five dollars each per year, and for all, hydrants in excess of the first fifty at the rate of fifty dollars each per year, beginning as soon as the said work shall be put into successful operation: which sums shall be paid by said city to said company quarter-yearly on the first days of January, April, July and October of each year and every year during the existence of said contract: and if any extension and extensions of pipe shall be made by said company during the said term of twenty-five years at the instance or request of said city the said city hereby agreed and binds itself to take on the line and lines of such extensions one hydrant, as soon as completed at each intersection of streets along the whole length of such extension and extensions, and to pay therefor for the unexpired term of said franchises at the rate of fifty dollars each per year, payable quarter yearly at the time as hereinbefore stipulated for the first sixty-two hydrants. But the said city shall have the right to have substituted for any two of said first sixty-two hydrants drinking fountains for man and beast, to be regulated by spring or self closing valves connected with the supply pipes, paying therefor the same compensation as is hereby fixed for hydrants.

Sec. 14. This ordinance shall become binding upon the said city of Owensboro as a contract in the event that the said Owensboro Water Company within ten days after its passage, shall file with the Mayor of the said city its written acceptance of the conditions of this ordinance; and after such acceptance this ordinance shall be the measure of the rights and liabilities of the said city and of the Water Company.

Sec. 15. An ordinance entitled "An Ordinance to Authorize the Erection of Water Works and to Operate and Maintain the same in the City of Owensboro passed July 30th, 1878, is hereby repealed.

Sec. 16. This ordinance shall take effect from its passage.

Sec. 17. And further that the books for subscription of Capital Stock shall be open in this city for ten days.

A duly certified copy of said ordinance is filed herewith as
50 a part hereof and is the same ordinance above referred to herein, marked "Exhibit J."

Defendant City states that by the language used in section 1 and in section 13 of the ordinance above set forth it was and is specially provided between the contracting parties that the franchises thereby granted to and vested in the Owensboro Water Company should remain in force and effect for twenty-five years from the passage of said Ordinance; that this contract, agreement and understanding between

the parties thereto was then and at all times thereafter understood and interpreted to carry the meaning and effect plainly stated therein that the extent and duration of said franchise should be twenty-five years, and no more, and was so accepted by said Owensboro Water Company and in all its dealings with defendant City was so interpreted and accepted by said Water Company and said City and was and is the true and only meaning to be given to the language used in said ordinance; and that by and under the terms and provisions of said ordinance which was accepted, ratified, acted upon and so interpreted by said Owensboro Water Company the franchises, privileges and rights granted to said Company expired by limitation on September 10th, 1903.

III.

Defendant City of Owensboro for its further answer states that some time prior to June 3, 1889, the complainant Owensboro Water Works Company was organized as a corporation, as hereinbefore admitted, and the representatives of complainant Company and the representatives of the Owensboro Water Company made known to the Mayor and Common Council of the defendant City that negotiations were pending or were about to be consummated whereby the
51 complainant Owensboro Water Works Company was about to purchase the property, contracts and franchises of said Owensboro Water Company and desired and requested the defendant City that it pass an ordinance permitting such purchase to be consummated and completed. In order to permit the sale and purchase of said property, rights and franchises, as aforesaid, and to show its agreement to and acquiesence in said contract of sale and purchase and to accept the complainant, Owensboro Water Works Company, as the contracting party in all ordinances, franchises, rights and undertakings theretofore made or entered into by or with the Owensboro Water Company, and for no other purpose, the defendant City of Owensboro passed the ordinance of June 3, 1889, filed as "Exhibit #3" with complainant's Bill and copied therein, accepting the complainant, Owensboro Water Works Company, as the other contracting party in lieu of the Owensboro Waterboro Company with the rights, privileges and franchises theretofore granted to the Owensboro Water Company, but said defendant city did not by said ordinance, or at all, ever extend or grant to the complainant Owensboro Water Works Company any rights, privileges, or franchises not theretofore granted to and then being enjoyed and exercised by said Owensboro Water Company, nor did defendant City by said ordinance, or at all, ever extend the time for which the rights and privileges and franchises were originally granted to the said Owensboro Water Company by the ordinance of September 10, 1878, hereinbefore set forth, and which said rights, privileges and franchises so obtained by the Owensboro Waterworks Company expired by limitation on the 10th day of September, 1903.

IV.

52 Pleading further the answering defendant city of Owensboro says that not only did the grant of the rights, privileges and franchises referred to in complainant's bill expire as aforesaid on September 10, 1903, according to the plain terms and provisions of the ordinances aforesaid, but said contracts and ordinances were so understood, interpreted and acted upon by both contracting parties thereto in this: that complainant not only contracted and agreed by and under the terms and provisions of the ordinance aforesaid of June 3, 1889, to take the property, rights, contracts, privileges and franchises granted to the Owensboro Water Company under ordinance of September 10, 1878, but by said ordinance of June 3, 1889, it undertook to perform all the conditions, obligations and requirements contained in said ordinance of September 10, 1878, and to be bound by the limitations therein obtained; and, among other things, the ordinance of September 10, 1878, provided in detail the manner, the construction, the character, capacity and arrangement of the Water Works plant and system to be constructed and maintained by the contracting party thereto, the Owensboro Water Company, and for the pressure, number and location of hydrants, for the location and extension of water mains, and pipes and for the extension of all such mains and pipes and the location and operation of additional fire hydrants thereon. Other rights were likewise provided to the contracting parties therein and it was specially contracted and provided that the City should rent from the said Water Company certain hydrants for fire purposes at certain rentals therein fixed and that in said ordinance it was specifically provided that, "if any extension and extensions of pipe shall be made by said company during the said term of twenty-five years at the instance or request of said city, the said City hereby

53 agrees and binds itself to take on the line and lines of such extensions one hydrant, as soon as completed at each intersection of streets along the whole length of such extension and extensions and to pay therefor for the unexpired term of said franchise at the rate of $50.00 each per year", to be paid for at stipulated times as stated therein; that after the passage of the ordinance of June 3, 1889, and pursuant to the terms thereof the City requested and required by an ordinance duly passed on October 6, 1890, that the complainant lay in the streets of said City certain mains and erect certain fire hydrants and provided in the same language as contained in said ordinance of September 10, 1878, as follows:" And in consideration of the compliance by the said Water Company with the said requests and requirements, the City of Owensboro hereby rents of the said Water Company the above named fourteen hydrants for the unexpired term of the franchise of the said Water Company, and promises to pay therefor during such terms at the rate of $40.00 each per annum, payable quarterly at the times hereinbefore stipulated for the existing fire hydrants," and in said ordinance it is further and specifically provided that the ordinance should become binding as a contract between the City

and the Water Company on condition that the Water Company within sixty days from such passage and publication should file with the City Clerk its written acceptance thereof. Defendant says that on October 21, 1890, the said Water Company filed its written acceptance agreeing to the terms and conditions of said ordinance, which acceptance was signed by its President and attested by the Secretary under the seal of said Company and a duly certified copy of said ordinance and written acceptance thereof is filed herewith as "Exhibit #1"; that again on February 2, 1891, by ordinance duly passed and signed by the Mayor and Common Council of defendant City the complainant, Owensboro Water Works
54 Company, was requested and ordered by said city to lay certain other water mains on the streets of said City and place other fire hydrants thereon, and such fire hydrants were by said ordinance rented at an express rental therein set out by the City of Owensboro "for the unexpired term of the franchises of the said Water Works Company," and afterwards on March 25, 1891, by order duly made the complainant, Owensboro Water Works Company, duly accepted the provisions of said ordinance under the signature of its President and its corporate seal, all of which fully appears by duly certified copies of said ordinance and acceptance which are filed herewith as part hereof, marked "Exhibit #2"; that again on November 7, 1892, by ordinance duly passed and signed by the Mayor and Common Council of defendant City the complainant, Owensboro Water Works Company, was requested and ordered by said City to lay certain other water mains in the streets of said City and place other fire hydrants thereon, and said fire hydrants were by said ordinance rented at an express rental therein set out by the City of Owensboro "for the unexpired term of the franchise with the said Water Works Company; and thereafter on December 3, 1892, by order duly made, the complainant, Owensboro Water Works Company duly accepted the provisions of said ordinance under the signature of its President and its corporate seal, all of which fully appears by duly certified copies of said ordinance and acceptance which are filed herewith as part hereof, marked "Exhibit #3"; and again on December 5, 1892, by ordinance duly passed and signed by the Mayor and Common Council of defendant City the complainant, Owensboro Water Works Company, was requested and ordered by said city to lay certain other water mains in the streets of said City and place other fire hydrants thereon, and such fire hydrants were by said ordinance rented at an express rental, therein set out by the City of Owens-
55 boro "for the unexpired term of the franchises of the said Water Works Company," and afterwards on December 29, 1892, by order duly made the complainant, Owensboro Water Works Company, duly accepted the provisions of said ordinance under the signature of its President and its corporate seal, all of which fully appears by duly certified copies of said ordinance and acceptance which were filed herewith as part hereof, marked "Exhibit #4"; and again on October 1, 1894, by ordinance duly passed

and signed by the Mayor and Common Council of defendant City, the complainant, Owensboro Water Works Company, was requested and ordered by said City to lay certain other water mains in the streets of said City and place other fire hydrants thereon, and such fire hydrants were by said ordinance rented at an express rental therein set out by the City of Owensboro "for the unpired term of the franchises of the said Water Works Company, and afterwards on October 25th, 1894, by order duly made the complainant, Owensboro Water Works Company, duly accepted the provisions of said ordinance under the signature of its President and its corporate seal, all of which fully appears by duly certified copies of said ordinance and acceptance which are filed herewith as part hereof, marked "Exhibit #5"; and again on May 7, 1894, by ordinance duly passed and signed by the Mayor and Common Coulcil of defendant City of Owensboro, the complainant, Owensboro Water Works Company, was requested and ordered by said City to lay certain other water mains in the streets of said city and place other fire hydrants thereon, and such fire hydrants were by said ordinance rented at an express rental therein set out by the City of Owensboro "for the unexpired term of the franchises of said Water Works Company," and afterward on July 3, 1894, by order duly made the complainant, Owensboro Water Works Company, duly accepted the provisions of said ordinance under the
56 signature of its president and its corporate seal, all of which fully appears by duly certified copies of said ordinance and acceptance which are filed herewith as part hereof, marked "Exhibit #6"; and again on September 16, 1895, by ordinance duly passed and signed by the mayor and common Council of defendant City, the complainant, Owensboro Water Works Company, was requested and ordered by said city to lay certain other water mains in the streets of said City and place other fire hydrants thereon, and such fire hydrants were by said ordinance rented at an express rental therein set out by the City of Owensboro "for the unexpired term of the franchise of the said water works Company," and afterwards on November 25, 1895, by order duly made the complainant, Owensboro Water Works Company, duly accepted the provisions of said ordinance under the signature of its President and its corporate seal, all of which fully appears by duly certified copies of said ordinance and acceptance which are filed herewith as part hereof, marked "Exhibit #7."

Defendant City says that after the passage of said ordinances the complainant Water Company did lay the mains required therein and attached to the fire hydrants as provided in said ordinance and the defendant City paid it rentals in pursuance to said contract until September 10, 1903, at which time the complainant ceased to collect and the City ceased to pay rentals for said hydrants as provided in said ordinance and contracts, and said ordinances and contracts were construed to and did expire on September 10, 1903, and since said date the City has not paid to the complainant any hydrant rental under any of said rental contracts, or at all.

V.

Answering defendant further states that both it and the
57 Complainant Company relied and acted upon the ordinances as aforesaid and the construction given to said ordinances, franchises and contracts by both the contracting parties thereto, as hereinbefore set out, and knowing and understanding that the franchises, privileges and rights of the defendant, Owensboro Water Works Company, would expire on September 10, 1903, and in consideration of the further fact that the water plant and system of the complainant Company had already become and was inadequate and insufficient to furnish or supply to the City of Owensboro, or its inhabitants, good or wholsc*oms* water, or in quantities sufficient for the daily demands and needs of said City and its inhabitants, the defendant City of Owensboro did in and during the year 1903, and immediately subsequent thereto, at great expense to itself and its citizens, erect and construct and equip a large modern and complete water works system including deep wells from which it obtains its water supply, and a large and expensive pumping station, reservoirs, softening plant and an extensive and perfect system of mains, conduits, hydrants and pipes for supplying all the necessities both of the defendant City and of all the inhabitants thereof from which it has been since said date and is now furnishing to its citizens pure and wholesome water at moderate cost and which plant and system has cost it more than $400,000.00; that it was induced to make this expenditure and construct its present water works system under the belief and with the understanding that the franchises, rights and privileges of the complainant Company granted to it under the ordinance hereinbefore mentioned expired on September 10, 1903, which belief and understanding was produced by its reliance upon the terms, conditions and provisions of the said ordinances as well as by the acts, and conduct of the complainant
58 Company and the construction and interpretation given to said ordinances by the Complainant as aforesaid; and defendant says that by its said acts and conduct as hereinbefore set out the complainant herein is estopped from claiming any other or different period for the expiration of its said franchises and rights from that which it agreed prior to 1903 was the true period of the expiration of its franchise and upon which construction of its contracts and franchises both the complainant and defendant City acted and based their conduct and operations in this matter at all times prior to about 1903.

VI.

Answering further the defendant City of Owensboro states that heretofore on September 21, 1903, the complainant, Owensboro Water Works Company, filed its Bill in Equity in the Circuit Court of the United States for the Sixth Circuit and Western District of Kentucky, Owensboro Division, which Bill was styled "The Owensboro Water Works Company, of Owensboro, Kentucky, Complainant, vs. The City of Owensboro, Kentucky, Defendant," being Equity

Action #137 upon the docket of said Court, and the parties thereto being the same parties complainant and defendant as in the case at bar. Thereafter on October 21, 1903, in said action the complainant filed an amended Bill of complainant. Prior to the filing of said last mentioned Bill and Amendment thereto the defendant, City of Owensboro, through and by the votes of its qualified voters at a regular election called and held for that purpose, had determined to issue bonds to the amount of $200,000.00 for the purpose of raising money with which to construct a water works system which
59 should bring to the defendant municipality and was about to sell said bonds and to make levies of taxes upon its citizens and to take other steps necessary to the construction and equipment of a water works plant and system which should be owned and operated by the defendant City; and the purpose of the Bill in Equity filed by the complainant herein, as aforesaid, was to enjoin and restrain the defendant city of Owensboro from issuing any such bonds or taking any steps whatever toward the erection, equipment or maintenance of such a water system of its own and to enjoin and restrain it from laying any mains, pipes, turnouts or conduits in the streets and alleys upon the public ways in said City, all of which will fully appear from duly certified copies of said Bill in Equity and Amendment thereto, which are filed herewith as a part hereof, marked "Exhibits M and N."

In said Bill the complainant herein set forth and relies upon the ordinances aforesaid of September 10, 1878, and of June 3, 1889, and it is therein averred by the complainant that said ordinances constituted a contract between it and the defendant City whereby there was granted unto the complainant herein the rights, privileges and franchises to operate and conduct its water plant for twenty-five years from and after June 3, 1889, and it was therein set forth that its said franchise and privilege would expire on June 3, 1914, among other things, it is stated by complainant in its said Bill of date September 21, 1903, as shown on page eighteen of "Exhibit M."

"And the grant of the rights, franchises and privileges aforesaid were then made directly to the said Owensboro Water Works Company, and were in addition to the rights, franchises and privileges which it acquired by its purchase of the rights, franchises and privileges by the Owensboro Water Company, and extended during the whole period of its corporate existence, a period of twenty-five years from and after the 1st of June, 1889."

And on pages twenty and twenty-one of said "Exhibit M" it says:

60 "Your orator most respectfully shows that by the contract embraced in the said ordinance of June 3d, 1889, as well as the contracts existing by and between the City of Owensboro and the Owensboro Water Company, all of which was transferred to and vested in your orator by and with the consent, and by the procurement of the said City of Owensboro, there was created and now exists between your Orator and the said defendant, City of Owensboro, a valid and binding contract whereby and wherein your Orator, the said Owensboro Water Works Company, has acquired and now has

conferred upon and vested in it the sole and exclusive right, franchise and privilege during the period of twenty-five years from and after June 1st, 1889, to maingain, complete and operate water works in the City of Owensboro for supplying the City of Owensboro and the inhabitants of said City and its vicinity, with water for public and private purposes from whatsoever sources said water may be taken and supplied and to use within the present and future limits of said city exclusively and solely the streets, alleys and other public highways for the purpose of laying and repairing and taking up mains, service pipes, hydrants and other apparatus for the supply of water; and it has the like sole and exclusive privilege and right to furnish all of the inhabitants of said City water for domestic purposes, and the City of Owensboro water through its hydrants for extinguishing fires, and for other public purposes, and that the City of Owensboro is bound by its said contract to pay to your orator for said hydrants during the said period of twenty-five years from and after June 1st, 1889, the hydrant rentals therein specifically named, $60.00 per annum each for the first one hundred hydrants and $40.00 per annum each for the remaining hydrants. But if the said contract shall not be construed to fix the price of hydrants after the expiration of twenty-five years from the date of the original contract with the Owensboro Water Company, then your orator most respectfully states that the said contract does confer and vest in it the exclusive privilege of furnishing water through hydrants to the said City during twenty-five years from the first day of June, 1889, at reasonable prices from and after the expiration of the original contract with the Owensboro Water Company."

And in complainant's prayer in said Bill on page forty-two of said "Exhibit M" it prays that the defendant, City of Owensboro, be restrained and enjoined

"also from entering upon the streets, alleys and other public places in said city for the purpose of and also from laying therein any of its pipes, conduits, turnouts, and from constructing and maintaining hydrants, or other appliances, and from constructing, equipping, operating or maintaining a system of water works in said City at any time until after the 1st day of June, 1914; and also from disregarding and violating its contracts existing between it and your orator as set out in this Bill."

61 The defendant City further says that with the amendment to its said Bill the complainant files as part thereof certain ordinances theretofore passed by the City of Owensboro authorizing the construction and laying of additional mains, water pipes and conduits and erecting additional fire hydrants on said streets, and by said amendment and exhibits so filed did construe its franchises with said City to expire on June 3, 1914.

The defendant City states and submits to the Court that by the statements and averments contained in the Bill of date September 21, 1903, as aforesaid, and the amendment thereto, the complainant was and is estopped to claim any other or different constructions

of the ordinances, franchises and privileges, or to claim any other period for the expiration and termination of its franchise thereunder, except as alleged in said Bill and Amendment; and the defendant City pleads and relies on and says that by reason of the averments in said Bill and its then contsruction of its alleged franchises, rights and privileges under said ordinances, it is now estopped from claiming or asserting in this action any right, privilege or franchise to operate and conduct its water works system in Owensboro since June 3, 1914.

VII.

The defendant City for further answer says that on May 27, 1904, the complainant filed its petition against the defendant herein, the City of Owensboro, in the Clerk's office of the Daviess Circuit Court of Kentucky, which was and is a court of general jurisdiction and had jurisdiction of the parties to said petition and the subject matter therein involved and litigated. The style of said action was "The Owensboro Water Works Company, of Owensboro, Kentucky,
62 etc., Plaintiffs, vs. The City of Owensboro, Defendant," and the party plaintiff thereto is and was the complainant herein and the defendant thereto is and was the defendant in this action.

The plaintiff, Owensboro Water Works Company, by its petition aforesaid sought to recover of the defendant, City of Owensboro, certain sums for hydrant rentals due on October 1, 1903, and on December 31, 1903, and as a basis for its recovery of said hydrant rentals it set out in said petition in detail and at length the organization of the Owensboro Water Company and the franchises granted to it by the City of Owensboro under the ordinance of September 10, 1878, and the franchises and privileges granted to the Owensboro Water Works Company as the successor of the Owensboro Water Company under the ordinance of June 3, 1889, and in its petition copied in full said ordinance of June 3, 1889, and upon which it relies for the recovery of the hydrant rentals set out in said petition, and which it sought to recover under said contract and ordinance claiming therein that its contracts with the City of Owensboro for hydrant rentals would expire at the same time the franchise granted to it by the City of Owensboro would expire under the ordinance of June 3, 1889, which it alleged in said petition was twenty-five years from and after said date and on June 3, 1914. A duly certified copy of said petition is filed as part hereof marked "Exhibit K". Among other things in its said petition and on page twenty and twenty-one of the certified copy filed herewith the complainant says,

"And the grant of the rights, franchise and privileges aforesaid were then made directly to the said Owensboro Water Works Company, and were in addition to the rights, franchises and privil-ges which it acquired by its purchase of the rights, franchises and privileges of the Owensboro Water Company, and extended during the whole period of its corporate existence, a period of twenty-five years from and after the 1st of June, 1889"

63 Again, on page twenty-two of said "Exhibit K" it says,

"Plaintiffs state that by the contract embraced in the said ordinance of June 3rd, 1889, as well as the contracts aforesaid existing by and between the city of Owensboro and the Owensboro Water Company, all of which were transferred to and vested in plaintiff, The Owensboro Water Works Company, by and with the consent, and by the procurement of the said City of Owensboro, there was created and now exists between plaintiffs The Owensboro Water Works Company, and the said defendant, City of Owensboro, a valid and binding contract whereby and wherein plaintiffs, the said Owensboro Water Works Company has acquired and now has conferred upon and vested in it the sole and exclusive right, franchise and privilege during the period of twenty-five years from and after June 1, 1889, to maintain, complete and operate water works in the City of Owensboro for supplying the City of Owensboro, and the inhabitants of said City and its vicinity, with water for public and private purposes."

Defendant City further says that in its said petition the complainant alleged that the defendant City had theretofore passed divers ordinances whereby it required the complainant to lay certain water mains, pipes and conduits and erect certain fire hydrants and for which fire hydrants the City agreed to pay it yearly rentals for the unexpired term of its franchises: that it agreed to the stipulations and conditions in said ordinances in writing and in said petition it set out said ordinances as a basis for a part of its claims in said petition and said ordinances are the same which are filed as exhibits with this answer and are marked exhibits #1 to #7, inclusive. In construing the period of the existence of said contracts contained in said ordinance the complainant in its said petition filed as "Exhibit K" alleged that said contracts contained in said ordinances were for a period of twenty-five years from and after June 3, 1889, and expired June 3, 1914. Said language setting out said ordinances and the construction thereof is found on pages twenty-five and twenty-six of said "Exhibit K", and is in words and figures as follows:

64 "Plaintiffs further state that defendant in and by each of said ordinances, requested said extensions and fire hydrants to be made and placed for the unexpired term of the franchise of this plaintiff, the Owensboro Water Works Co., and in consideration that it would make said extension and erect said hydrants, the defendant, in and by said ordinances, rented of it said additional fire hydrants for said unexpired term, and promised to pay therefor, during such terms, at the rate of $40.00 each per annum, payable quarterly, at the times hereinbefore stipulated, for the rent of the then existing fire hydrants."

The defendant City says that the complainant herein by reason of its acts and its averments in said petition filed as "Exhibit K" and in asserting and construing that its rights, privileges and franchises under said ordinances of September 10th, 1878, and June 3, 1889, expired twenty-five years from and after said June 3, 1889, is now estopped from asserting or claiming in this action that its

rights, privileges, or franchises did not expire on June 3, 1914, and the defendant City pleads and relies upon its said acts, statements and averments as such an estoppel.

VIII.

Further answering, the defendant City of Owensboro says that at the time the ordinance of date June 3, 1889, was passed and approved by the defendant City, the Act of the General Assembly of the State of Kentucky incorporating the City of Owensboro and entitled, "An Act creating a New Charter for the City of Owensboro, which was approved March 18, 1882, as will appear from Session Acts of the General Assembly of the State of Kentucky of date 1881-2, Volume 1, pp. 817-56, was in full force and effect. By and under the terms of said act which created the City of Owensboro as a minicipal corporation and from which it derived all the power or authority it had at the time of the passage of said ordi-
65 nance in 1889, there was specially delegated to the City Council of defendant City the right to amend and repeal the ordinance aforesaid; that section 10 of the said City Charter of the City of Owensboro, which was in force at the time of the adoption of said ordinance, was and is in words and figures as follows, to-wit:

"Section 10: The Common Council shall have control of the finances and all property, real and personal, belonging to the City, and shall have full power to make, publish, amend and repeal all ordinances for the following purposes, to-wit: * * * Seventh: to prevent or regulate the encumbering of streets, alleys, sidewalks, wharfs, landings, market places, public grounds, and buildings with any vehicles, material or substance and to prohibit persons from trespassing on or injuring public grounds, buildings or property, or riding upon or driving across the sidewalks or in any manner injuring the same, * * * Twenty-seventh: To regulate the streets, alleys, and sidewalks and all improvements and repairs thereof * * * Thirty-Seventh: And in granting such licenses, as by this Act the Common Council is authorized to grant, they shall charge such sum or sums of money as they shall deem fit and reasonable, and annex to such licenses such terms and conditions, as in their opinion the peace, good order and general interest of the City shall require."

The defendant City further says that at the time of the passage of said ordinance of June 3, 1889, the defendant City did not have any authority and no authority existed at law, or was there any law in existence authorizing or empowering the Mayor and City Council of said City, or authorizing or empowering said City in any manner whatever, to grant to the complainant herein any perpetual franchise, or to make any irrepealable contract with the complainant by or under the terms whereof the complainant was or could have been authorized or empowered to use the streets of said City for its purpose as set out in its Bill or for the purposes of laying therein any pipe, mains, conduits or other appliances, or for using the streets

of said City for any purpose, or at all, except in strict compliance with the terms of the grant and franchise contained in the ordinances hereinbefore set forth and for the time and during the period for and within which said franchise was granted by said ordinances; and this defendant did not and could not have
66 granted to the complainant herein any privilege, grant or franchise perpetual in character or as to time, and it did not grant or attempt to grant to the complainant herein any such license, right or franchise beyond the period of twenty-five years from the time of such grant, as hereinbefore fully set forth.

Defendant City denies that complainant is entitled to any relief, or any part of the relief, demanded in its Bill of Complaint herein, and says that Complainant has no standing in this court, or in any court of equity, and says there is no equity in the Bill. All of which matters and things this defendant is ready and willing to prove and establish as this court shall direct, and prays to be hence dismissing with its reasonable costs and charges in this behalf sustained.

CITY OF OWENSBORO,
By J. H. HICKMAN, *Mayor.*

GEORGE S. WILSON,
LEVEGA CLEMENTS,
BEN. D. RINGO,
Counsel for Defendant, City of Owensboro.

67 STATE OF KENTUCKY,
County of Daviess:

James H. Hickman, being duly sworn, deposes and says that he is the mayor and chief officer of the defendant City of Owensboro, which is a municipal corporation of the third class in the State of Kentucky, and the same named in the foregoing answer; that he is well acquainted with its business and has read the foregoing answer and knows the contents thereof; that the same is true to the knowledge of this deponent, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

J. H. HICKMAN.

Subscribed and sworn to before me by James H. Hickman, this 18th day of November, 1914.

MARTINE J. HADEN,
Notary Public, Daviess County, Kentucky.

68 EXHIBIT "J," FILED WITH THE ANSWER OF DEFENDANT, CITY OF OWENSBORO.

Filed November 21, 1914.

"September 10th, 1878.

Be it ordained by the Mayor and City Council of Owensboro:

Sec. 1. That the privilege is hereby granted to the Owensboro

Water Company, a corporation organised under the laws of the State of Kentucky, and to its successors, and assigns, for the duration of the said Company to construct and operate in the City of Owensboro Water Works for the supply of said City and the inhabitants thereof with water from the Ohio River for public and private purposes, and to use the streets, alleys and other public highways within the present and future limits of said city for the purpose of laying and repairing pipes, conduits, hydrants and fountains for the supply of water. But there shall be no continued unreasonable obstruction of the said streets, alleys and other public highways, and they shall be restored by said Company as near as practicable to their former condition. All other property of said Company shall be located on private grounds.

Sec. 2. The said Water Works shall be constructed upon the plan of pumping water into the pipes system directly from the Ohio River, but after the expiration of two years from the completion of said works, upon being required to do so by a vote of two-thirds of the members of the City Council the said company shall erect a stand pipe of the size and character hereinafter mentioned.

69

Sec. 3. The power and capacity of said works shall be sufficient to throw four streams of water at one time over the roof of any house now in the line of the eight inch pipe; or to throw three streams of water at one time over the roof of any house now on the line of the six inch pipe or to throw two streams of water at one time over the roof of any house now on the line of the four inch pipe; each stream to be from a separate hydrant through five hundred feet of two and one-half inch hose and a nozzle of one and one-quarter inch in diameter. The said Company shall at all times be ready, unavoidable accidents excepted, to supply a sufficient quantity of water for the necessities of public and private use, to keep all hydrants rented of it by said City in good repair and ready for instant use in extinguishing fires by the fire department of said City, and to furnish direct pressure from the pumps when a fire alarm is given to the party in charge of the pumping machinery.

Sec. 4. When any hydrants or fountains rented of said Company by said City shall be out of repair, and said company shall neglect or fail, within a reasonable time after a written notice by said City, to put same into thorough repair and good working order the said city shall not be liable for any rent of such hydrant or hydrants, fountain or fountains, during the time the same shall continue to be out of repair after such notice.

Sec. 5. In the event of a failure by reason of wilful neglect and mismanagement of said company, to supply a sufficient quantity of water to the said fire department, the said city shall not be liable for any rent of hydrants and fountains during the time of such failure. And the hydrants rented by the said city shall be used by it only for the extinguishing of fires and for washing between the hours of ten and eleven o'clock a. m., the public sewers and gutters and the city wharf, not exceeding one hour during any one day, and two streams only shall be thrown in washing at one and the same time.

Sec. 6. The pump house of said company shall be built of brick and shall be of handsome design and finish, with a brick smoke stack seventy-five feet high above the ground, and shall be of sufficient size to accommodate the operative machinery of said company. There shall be two steam pumps of the most approved construction, having a capacity when working together to pump two million gallons of water in twenty-four hours. To each shall be attached one of sulkey's patented condensers, and there shall be two steam
70 boilers of sufficient size, each attached to its respective pump.

In the event that the said company shall be required to build a stand pipe, the stand pipe shall be constructed of wrought iron plates, riveted together, twenty feet in diameter and one hundred feet high, upon a foundation of brick or stone, laid in cement. The pipe system shall be in the following streets, viz:

In Main Street from Pearl to Walnut Streets.....	4200 feet
In Third Street form Pearl to Walnut Streets.....	4200 feet
In Fourth Street from Center to Walnut Streets.....	4500 feet
In Seventh Street from Center to Walnut Streets.....	4800 feet
In Walnut Street from Center to Walnut Streets.....	2800 feet
In Locust Street from Fourth to Seventh Streets.....	1800 feet
In Frederica Street from Main to Seventh Streets.....	2800 feet
In Crittenden Street from Main to Seventh Street.....	2800 feet
In Center Street from Fourth to Seventh Streets.....	1800 feet
In Pearl Street from Main to Fourt- Streets.....	800 feet
Total about	30600 feet

The said pipe shall be of cast iron, warranted to withstand a hydrostatic pressure of 250 pounds per square inch, cast on end in flasks, free from any flaws or defects and coated with Dr. Smith's patent coal tar varnish. There shall be one cross, one tee, and one fire-hydrant, having two discharge nozzles at each intersection of streets, with a sufficient number of stop valves, protected by iron boxes, to form a complete cut off system for said works. The nozzels of the hydrants shall be made to fit the hose now in use by the said fire department.

Sec. 7. The said pump house and its appurtenances shall be located within the corporate limits of the said city if the council so desire, and the water to supply the said city and its inhabitants shall be taken by said Company from the Ohio River at a point above the present drainage of sewers of said City.

71 Sec. 8. Should the said city adopt a fire alarm telegraph or telephone the said company shall convey at its expense the wires from its pump house *or* the length of not exceeding one thousand feet to the nearest box or station, and shall connect the wires at the pump house with some suitable device to produce alarm signals.

Sec. 9. The said company shall have the power and authority to make and enforce as part of the conditions upon which it will

supply water to its consumers, all needful rules and regulations, not inconsistent with the laws or the provisions of this ordinance.

Sec. 10. The said City will adopt and enforce ordinances protecting the said company in the safe and unmolested exercise of these franchises, and against fraud and imposition, and against injury, to the hydrants, and fountains rented by it to said city and against waste of water by consumers.

Sec. 11. The said Company shall commence in good faith the construction of said work within thirty days after the passage of this ordinance, and shall continuously and dilligently prosecute said construction until the completion and successful operation of the same; in default whereof the city council may by a vote of two-thirds of its members declare the contract of said city for the payment of said fire service to be forfeited and void.

Sec. 12. The said city shall have the option and privilege at any time after the expiration of ten years from the passage of this ordinance, to purchase the said water works with all the properties and franchises the price to be ascertained in the following manner; Three disinterested persons of good intelligence, not residents of Owensboro, or Daviess County, Kentucky, shall be chosen one of them by the said city, another by said company, and the third by the first two; and the three or their majority shall make an award, to the amount of which shall be added ten per centum thereof; and the said city shall have the option of refusing to purchase after the said award shall have been made, or to pay to said company in cash within three months from date of said award the said award and in addition the said ten per centum; but in that event the said city shall assume as a part of the sum to be paid and shall pay the bonded and floating indebtedness of said company,

Sec. 13. In consideration of the benefits which will be derived by the said city and its inhabitants by the construction and operation of said Water Works and in further consideration of the risk of so large an investment by said company in said city in a new and untried enterprise, the rights, privileges and franchises hereby granted to and vested in said company shall remain in force and effect for twenty-five years from the passage of this ordinance, and the said company shall be exempt from the payment of all taxes which shall be assessed or levied for the use or benefit of the said city for two years from the passage of this ordinance and the said city hereby

rents of the said company for the uses hereinbefore set
72 out one fire hydrant at each intersection of streets along the lines of pipe hereinbefore mentioned in all sixty-two hydrants, for and during the term of twenty-five years from the passage of this ordinance, and agrees and binds itself to pay therefor to said company as follows, to-wit: For the first fifty hydrants at the rate of seventy-five dollars each per year, and for all hydrants in excess of the first fifty at the rate of fifty dollars each per year, beginning as soon as the said work shall be put into successful operation, which sums shall be paid by said city to said company quarter yearly on the first days of January, April, July and October of each year and every year during the existence of said contract; and if any exten-

sion and extensions of pipe shall be made by said company during the said term of twenty-five years at the instance or request of said city the said city hereby agreed and binds itself to take on the line and lines of such extensions one hydrant, as soon as completed as each intersection of streets along the whole length of such extension and extensions, and to pay therefor for the unexpired term of said franchises at the rate of fifty dollars each per year, payable quarter yearly at the time as hereinbefore stipulated for the first sixty-two hydrants, But the said city shall have the right to have substituted for any two of said first sixty-two hydrants drinking fountains for man and beast, to be regulated by spring or self closing valves connected with the supply pipes, paying therefore the same compensation as is hereby fixed for hydrants.

Sec. 14. This ordinance shall become binding upon the said city of Owensboro as a contract in the event that the said Owensboro Water Company within ten days after its passage, shall file with the Mayor of the said city its written acceptance of the conditions of this ordinance; and after such acceptance this ordinance shall be the measure of the rights and liabilities of the said city and of the Water Company.

Sec. 15. An Ordinance entitled "An Ordinance to Authorize the erection of Water Works and to Operate and Maintain the same in the City of Owensboro passed July 30th, 1878, is hereby repealed.

Sec. 16. This ordinance shall take effect from its passage.

Sec. 17. And further that the books for subscription of Capital Stock shall be open in this city for ten days.

73 COMMONWEALTH OF KENTUCKY,
City of Owensboro, sct:

I, W. A. Wahl, Clerk of the City of Owensboro, State of Kentucky, do certify that the foregoing seven (7) pages, contain a true copy of an ordinance passed and ordained by the Mayor and City Council of Owensboro, on September 10th, 1878, as the same appears from the records of my office, of which records I am the legal custodian.

Given under my hand and seal of the City of Owensboro, this Eighteenth day of November, A. D. 1914.

[SEAL.] W. A. WAHL,
City Clerk.

EXHIBIT "#1," FILED WITH DEFENDANT'S ANSWER.

Filed November 21, 1914.

An Ordinance Ordering the Owensboro Water Works Company of Owensboro, Ky., to Lay Additional Mains, and Renting of it Additional Fire Hydrants.

Be it ordained by the Mayor and City Council of Owensboro:

Section 1. That the City of Owensboro hereby requests and orders

the Owensboro Water Works Company, of Owensboro, Ken-
74 tucky to lay in the streets of the said City the following mains, to-wit:

On Breckenridge Street from Fifth Street to Fourth Street.

On Fourth Street from Breckenridge east to the Toll-Gate on the Hardinsburg Road.

On Triplett Street from Virginia to Maryland Street.

On McFarland Street from Triplett Street to Sweeney Street.

On Sweeney Street from McFarland Street to Virginia Street.

On Mildred Street, from Maple to Vine Street.

On Vine Street, from Mildred Street to the Henderson Road.

On Main Street, from Sycamore Street to Plum Street.

And the City of Owensboro further requests and requires the said Water Company to put up at the places hereinafter set forth the following fire hydrants, to-wit:

One at or near the intersection of Fourth Street and the Leitchfield Road.

One on the Hardinsburg Road, near the J. Hardy Tobacco Works.

One at the Toll-Gate on the Hardinsburg Road.

One on the North east corner of Triplett and Virginia Streets.

One on the North-east corner of Triplett and Maryland Streets.

One on the North east corner of Sweeney and McFarland Streets.

One on the Northeast corner of Sweeney and Virginia Streets.

One on the Northeast corner of Plum & Mildred Streets.

One on the northeast corner of Vine Street and the Henderson Road.

One on the Southeast corner of Fifth and Vine Streets.

75 One on the Southeast corner of Fifth and Plum Streets.

One on Walnut Street, between McFarland and Little Avenue.

One on the southeast corner of Main and Maple Streets.

One on the Southeast corner of Main and Plum Streets.

The City of Owensboro to indicate to the said Water Company in due time the exact location of the first, second, third, and twelfth hydrant above specified, and also to indicate to the said Water Company the proper curbline at the respective locations of all of the above designated fourteen fire-hydrants where the curbing is not already laid; and also to indicate to the said Water Company the proper and correct grade of any and all of the Streets or roads on which mains are ordered to be laid as herein specified, and on which the grade may not have been definitely made and established at the time the said Water Company shall be ready to commence laying the mains on the respective streets. And in consideration of the compliance by the said Water Company with the said requests and requirements, the City of Owensboro hereby rents of the said Water Company the above named fourteen (14) hydrants for the unexpired term of the franchises of the said Water Company, and promises to pay therefor during such terms at the rate of forty Dollars ($40.00) each per annum, payable quarterly at the times hereinbefore stipulated for the rent of existing fire hydrants.

This ordinance shall take effect from its passage and publication,

and shall become binding as a contract between the City of Owensboro and the said Water Company, on condition that the said Water Company within Sixty days from such passage and publication shall file with the City Clerk its written acceptance hereof:

MONDAY, October 6, 1890.

76 The following was received and ordered of record.

LOUISVILLE, KY., Oct. 21st, 1890.

To the City of Owensboro, Ky.:

Please take notice that the Owensboro Water Works Company of Owensboro, Kentucky hereby accepts the ordinance passed by your City Council October 6th, 1890; entitled "An ordinance ordering the Owensboro Water Works Company of Owensboro, Kentucky, to lay additional mains and renting of it additional fire hydrants."

Yours respectfully,
THE OWENSBORO WATER WORKS CO.,
OF OWENSBORO, KENTUCKY,
By SAM'L A. MILLER, *Pres.*

Attest:
[SEAL.] WM. REINKE, *Sec'y.*

(Recorded in Minute Book F at page 286.)

EXHIBIT "#2," FILED WITH THE ANSWER OF DEFENDANT, CITY OF OWENSBORO.

Filed November 21, 1914.

An Ordinance Ordering the Owensboro Water Works Company of Owensboro, Kentucky, to Change the Location of Certain Mains and Fire Hydrants.

Whereas the City of Owensboro did on October 6th, 1890, pass a certain ordinance entitled "An Ordinance ordering the Owensboro Water Works Company, of Owensboro, Kentucky to lay ad-
77 ditional mains and renting of it additional fire hydrants, and,

Whereas the City of Owensboro, desires to change the location of certain mains and fire hydrants called for in said ordinance passed October 6th, 1890, and,

Whereas the Owensboro Water Works Company of Owensboro, Kentucky, is willing to make said changes:

Now, therefore, be it ordained by the Mayor and Common Council of Owensboro:

Section 1. The City of Owensboro hereby annuls and countermands its request and order to the Owensboro Water Works Company, of Owensboro, Kentucky, to lay in the streets of the said City the following mains, to-wit:

On Mildred Street from Maple Street to Vine Street.

On Vine Street, from Mildred Street to the Henderson Road.

And instead of these mains above specified, the City of Owensboro hereby requests and orders the Owensboro Water Works Company of Owensboro, Kentucky, to lay in the Streets of the said City the following mains, to-wit:

On Seventh Street, from Sycamore Street to Plum Street.

On Plum Street, from Seventh Street to Mildred Street.

The City of Owensboro hereby annuls and countermands its request and order to said Water Works Company to put up the fire hydrant on the North East corner of Vine Street and the Henderson Road, and instead of this fire hydrant, the City of Owensboro hereby requests and orders said Water Works Company to put up a fire hydrant on the South east corner of Seventh and Plum Streets;

And in consideration of the compliance by said Water Works Company with the requests and requirements herein the City of Owensboro hereby rents of the said Water Works Company the fire hydrant on the South east corner of Seventh and Plum
78 Streets for the unexpired term of the franchises of the said water works Company, and promises to pay therefor during such term at the rate of forty dollars ($40.00) per annum, payable quarterly, at the times hereinbefore stipulated for the renting of existing fire hydrants.

This ordinance shall take effect from its passage and publication, and shall become binding as a contract between the City of Owensboro and the said Water Works Company, — within sixty days from such passage and publication shall file with the City Clerk the written acceptance hereof.

MONDAY, February 2, 1891.

The following was ordered of record:

LOUISVILLE, KY., March 25th, 1891.

To the Honorable Mayor and Common Council of the City of Owensboro:

Please take notice that the Owensboro Water Works Company hereby accepts the provisions of the Ordinance passed by the Common Council of the City of Owensboro, Feby. 2nd, 1891, entitled "An Ordinance ordering the Owensboro Water Works Company, of Owensboro, Kentucky, to change the location of certain mains and fire hydrants."

Yors respectfully,

[SEAL.] THE OWENSBORO WATER WORKS COMPANY,
By SAML. A. MILLER, *Pres.*

(Recorded in Minute Book F—Page 360.)

79 EXHIBIT "#3", FILED WITH THE ANSWER OF DEFENDANT, CITY OF OWENSBORO.

Filed November 21st, 1914.

The following ordinance was submitted and read whereupon on motion of the rules of order as to voting on ordinances were suspended and the same after its second reading was adopted by the following vote, to-wit: Ayes Messrs. Decker, Norton, Hill, Smith, Grausz. Noes Mr. Stirman.

Be it ordained by the Mayor and Common Council of Owensboro:

Section 1. That the City of Owensboro hereby requests and orders the Owensboro Water Works Company of Owensboro, Ky., to lay in the streets of said city of Owensboro the following six-inch mains, to-wit:

On Walnut Street from Little Avenue to Elm Street;
On Twelfth Street from Walnut to Elm Street;
On Main Street from Center to Hathaway Street;

And the City of Owensboro further requests and requires the said Water Company to put up at the places hereinafter set forth the following fire hydrants, to-wit:

One at the intersection of Twelfth and Elm Streets;
One at the intersection of Twelfth and Walnut Streets;
One at the intersection of Main and Hathaway Streets;

The City of Owensboro shall indicate to the Owensboro Water Works Company in due time the proper curb line at the respective locations of all the above designated three fire hydrants where the curbing is not already laid, and shall also indicate to the said Water company the proper and correct grade on any and all of the streets on which the mains are ordered to be laid as herein specified, and on
80 which the grade may not have been definitely made and established at the time the said Water Company shall be ready to commence laying the mains on the respective streets.

Section 2. In consideration of the compliance of the said Water Company with the said requests and requirements of the City of Owensboro as herein set forth the City of Owensboro hereby rents of the Owensboro Water Works Company the above named fire hydrants for the unexpired term of the franchises of the said Water Company, beginning with the date when such hydrants shall be respectively put up and connected with the water works of the Owensboro Water Works Company and promises to pay therefor at the rate of forty dollars ($40) each per annum, payable quarterly on the first day of January, April, July and October of each year.

Section 3. This ordinance shall take effect from its passage and publication and shall become binding as a contract between the City of Owensboro and the Owensboro Water Works Company on condition that the said Water Company shall within sixty days from

such passage and publication, file with the City Clerk its written acceptance thereof.

Passed and approved Monday, Nov. 7th, 1892.

(Recorded in Minute Book F—page 549.)

The following was received and ordered of record, viz:

LOUISVILLE, KY., December 3d, 1892.

To Honorable City Council of the City of Owensboro, Kentucky.

GENTLEMEN: Please take notice that the Owensboro Water
81 Works Company hereby accepts the terms and conditions of the ordinance of the City of Owensboro, passed and approved November 7th, 1892, entitled "An ordinance for extending the water mains of the Owensboro Water Works Company of Owensboro, Kentucky, and renting of it three additional fire hydrants."

Witness the signature of the Owensboro Water Works Company by its Treasurer, and its corporate seal attested by its Secretary, this 3rd, day of December, 1892.

THE OWENSBORO WATER WORKS COMPANY,
By A. F. CALLAHAN, *Treas.*

Attest:
[SEAL.] WM. SACKETT, *Sec'y.*

(Recorded in minute Book F—Page 558.)

EXHIBIT "#4," WITH ANSWER OF DEFENDANT, CITY OF OWENSBORO.

Filed November 21st, 1914.

The following ordinance was submitted and read whereupon on motion the rules of order were suspended as to voting on ordinances and the same after its second reading was adopted by the following votes to-wit:—Ayes, Messrs. Decker, Norton, Smith, Stirman. Noes, Messrs. Hill and Grausz.

Be it ordained by the Common Council of the City of Owensboro.

Section 1. That the City of Owensboro hereby requests and orders the Owensboro Water Works Company, of Owensboro, Ky., to establish a fire hydrant at the intersection of Littles avenue and Elm Street.

Section 2. In consideration of the compliance of said Water Company with said requests herein set forth, the City of Owensboro hereby rents of said Owensboro Water Works Company the
82 above named fire hydrant- for the unexpired term of the franchises of the said Water Company, beginning with the date when such hydrant shall be put up and connected with the Water Works of the Owensboro Water Works Company, and promises to pay therefor the rate of forty ($40.00) dollars per annum,

payable quarterly on the first days of January, April, July and October of each year.

Section 3. This ordinance shall take effect from and after its passage and publication, and shall become binding as a contract between the City of Owensboro and the Owensboro Water works Company on condition that the said Water Company shall within sixty days from such passage and publication file with the City's Clerk its written acceptance thereof.

(Recorded in Minute Book F—Page 556.)

December 5, 1892.

The following communication was received and ordered of record, viz:

LOUISVILLE, KY., December 29, 1892.

To the Honorable City Council, of the City of Owensboro, Ky.

GENTLEMEN: Please take notice that the Owensboro Water Works Company hereby accepts the terms and conditions of the ordinance of the City of Owensboro, passed and approved November 21st, 1892, entitled an ordinance to establish a fire hydrant at the intersection of Little's Avenue and Elm Street," and hereby accepts the terms and conditions of the ordinance of the City of Owensboro, passed and approved December 5th, 1892, entitled "An Ordinance requesting the laying of water mains on Littles Avenue from
83 Walnut Street to Elm Street."

Witness the signature of the Owensboro Water Works Company by its Treasurer and its corporate seal attested by its Secretary this 29th, day of December, 1892.

THE OWENSBORO WATER WORKS COMPANY,
By A. F. CALLAHAN, *Treas.*

Attest:
[SEAL.] WM. SACKETT, *Sec'y.*

(Recorded in Minute Book F—page 572.)

EXHIBIT "#5," WITH ANSWER OF DEFENDANT, CITY OF OWENSBORO.

Filed November 21, 1914.

An Ordinance Providing for Extending the Water Mains of the Owensboro Water Works Company of Owensboro, Ky., and Renting of it Six Additional Fire Hydrants.

Be it Ordained by the Common Council of the City of Owensboro:

Section 1. The City of Owensboro hereby requests and requires the Owensboro Water Works Company, of Owensboro, Ky., to lay

in the streets of said City of Owensboro, the following six-inch mains, to-wit:

84 On Fifth Street from Breckenridge Street to Leitchfield road;

On Leitchfield Road from Fifth Street to Eighth Street; On Eighth Street from Leitchfield Road to Hall Street; On Hathaway Street from Seventh to Eighth Street.

And the City of Owensboro further requests and requires the said Water Company to put at the places hereinafter set forth the following fire hydrants, to-wit:

One at the intersection of Fifth Street and the Leitchfield Rd.

One at the intersection of Sixth Street and the Leitchfield Rd.

One at or near the Intersection of Seventh St., and the Leitchfield road;

One at the intersection of Eighth St., and the Leitchfield Rd.

One at the intersection of Jackson and Eighth Streets;

One at the intersection of Hathaway and Eighth Streets;

The City of Owensboro shall indicate to the Owensboro Water Works Company in due time the proper curb line at the respective locations of all of the above designated six fire hydrants where the curbing is not already laid, and shall also indicate to the said Water Company the proper and correct grade on any and all of the Streets on which the mains are to be laid as herein specified, and on which the grades may not have been definitely made and established at the time the said Water Company shall be ready to commence laying the mains on the respective streets.

Section 2. In consideration of the compliance by the said Water Company with the said requests and requirements of the City of Owensboro as herein set forth, the City of Owensboro hereby rents of the Owensboro Water Works Company the above named six fire hydrants for the unexpired term of the franchises of the said water Company, beginning with the date when such hydrants shall be respectively put up and connected with the water works of the Owensboro Water Works Company, and promises to — therefor at the rate of forty dollars ($40.00) each per annum, payable quarterly on the first days of January, April, July and October of each year. This

85 renting to be subject to the contract existing between the City and said Company.

Section 3. This ordinance shall take effect from its passage, and shall become binding as a contract between the City of Owensboro and the Owensboro Water Works Company on condition that the said Water Company shall within sixty days from such passage file with the City Clerk its written acceptance hereof.

Approved, Oct., 1st., 1894.

J. H. HICKMAN, *Major.*

Attest:

PHIL R. ZULAUF, *City Clerk.*

(Recorded in Special Ordinance Book No. 1.)

The following notice from the Owensboro Water Works Company was received and filed:—

LOUISVILLE, KY., October 25th, 1894.

To the Honorable City Council of the City of Owensboro, Ky.

GENTLEMEN: Please take notice that the Owensboro Water Works Company hereby accepts the terms and conditions of the ordinance of the City of Owensboro passed and approved October 1st, 1894, entitled "An Ordinance providing for extending the mains of the Owensboro Water Works Company, of Owensboro, Kentucky, and renting of it six additional fire hydrants."

Witness the signature of the Owensboro Water Works Company by its Vice President, and its corporate seal attested by its Secretary this the 25th day of October, 1894.

86 THE OWENSBORO WATER WORKS COMPANY,
By A. F. CALLAHAN, *Vice-Pres.*

[SEAL.]

Attest:
WM. SACKETT, *Sec'y.*

(Recorded in Minute Book G, page 194.)

EXHIBIT "#6," FILED WITH ANSWER OF DEFENDANT, CITY OF OWENSBORO.

Filed November 21, 1914.

An Ordinance Providing for Extending the Water Mains of the Owensboro Water Works Co., of Owensboro, Kentucky, and Renting of it One Additional Fire Hydrant.

Be it ordained by the Mayor and City Council of Owensboro:

Section 1. That the City of Owensboro hereby requests and orders the Owensboro Water Works Company, of Owensboro, Kentucky, to lay in the streets of said City of Owensboro a six inch main on Main Street from Plum Street to Orchard Street,

And the City of Owensboro further requests and requires the said Water Company to put up at the intersection of Main and Orchard Streets a fire hydrant.

The City of Owensboro shall indicate to the Owensboro Water Works Company in due time, the proper curb line at the location of the above designated fire hydrant, if the curbing is not already laid, and shall also indicate to the said water company, the proper and correct grade on the street in which the main is ordered to be laid as herein specified, if the grade shall not have been definitely made and established at the time the said Water Company shall be ready to commence laying the main.

Section 2. In consideration of the compliance by the said Water Company with the said requests and requirements of the City of Owensboro as herein set forth, the City of Owensboro hereby rents of the Owensboro Water Works Company the above named fire hydrant for the unexpired term of the franchises of the said Water Company beginning with the date when such hydrant shall be put up and connected with the water works of the Owensboro Water Works Company subject to all the conditions and limitations
87 in the original contract with said company, and promises to pay therefor at the rate of forty dollars ($40.00) per annum, payable quarterly on the first days of January, April, July, and October of each year.

Section 3. This ordinance shall take effect from its passage and publication, and shall become binding as a contract between the City of Owensboro and the Owensboro Water Works Company on condition that the water company shall within sixty days from such passage and publication file with the City Clerk its written acceptance thereof.

Approved May 7, 1894.

J. H. HICKMAN, *Mayor.*

Attest:
PHIL R. ZULAUF, *Clerk.*

The following communication was received, to-wit:

To the Honorable City Council of the City of Owensboro, Ky.

GENTLEMEN: Please take notice that The Owensboro Water Works Company hereby accepts the terms and conditions of the ordinance of the City of Owensboro, passed and approved May 7th, 1894, entitled "An ordinance extending the water mains of the Owensboro Water Works Company, of Owensboro, Kentucky, and renting of it one additional fire hydrant".

Witness the signature of the Owensboro Water Works Company by its Treasurer, and its corporate seal attested by its Secretary this 3rd day of July, 1894.

THE OWENSBORO WATER WORKS COMPANY,
By A. F. CALLAHAN, *Pres.*

88 [SEAL.]

Attest:
WM. SACKETT, *Sec't'y.*

(Recorded in Minute Book G, page 157.)

EXHIBIT #7, FILED WITH ANSWER OF DEFENDANT, CITY OF OWENSBORO.

Filed November 21st, 1914.

An Ordinance Providing for Extending the Water Mains of the Owensboro Water Works Company of Owensboro, Ky., and the Renting of Said Company of Three Fire Hydrants.

Be it ordained by the Common Council of the City of Owensboro:

Sec. 1. That the City of Owensboro hereby requests and directs the Owensboro Water Works Company of Owensboro, Kentucky, to lay in the Streets of the City of Owensboro, Ky., a six inch main along Maryland Street from Triplett Street to Sweeney Street, approximately 440 feet, and along Maryland Street from Sweeney Street to Moseley Street, approximately 445 feet, and from end of pipe on McFarland Street at Smith's corner to the curbing on the east side of Center Street along McFarland Street, approximately 290 feet; and it also requests and required said Company to put up three additional fire hydrants of the kind and quality contemplated by the contract between the City of Owensboro and said Company, and the most modern kind now in use in said City by said Company, and at the following points; at the intersection of McFarland Street with Center Street; and at the intersection of Maryland Street with Sweeney Street, and one at the intersection of Maryland Street with Moseley Street.

The City of Owensboro will indicate to the Owensboro Water Works Company, in due time, the exact location of the above
89 designated fire hydrants, the proper curbing line at the location of same, if the curbing line is not already laid, and it will also indicate to the water works Company the proper and correct grade on the streets in which the mains are laid as herein specified, if the grades shall not have been definitely made and established at the time the said Water Company shall be ready to lay said mains.

In consideration of the compliance of said Water Company with the said requests and requirements of the City of Owensboro, as herein set forth, the City of Owensboro hereby rents of the Owensboro Water Works Company the above named three fire hydrants for the unexpired term of the franchise and contract of the said Water Works Company, beginning with the date when such hydrants shall be put up and connected with the Water Works of the Owensboro Water Works Company, and put in condition to be used by the fire department of said City, the said renting to be on the terms and conditions provided and stipulated in the contract now existing between said City and said Company. And the said City promises to pay therefor at the rate of $40.00 per annum, payable quarterly on the first day of January, April, July and October of each year.

Sec. 3. This ordinance shall take effect and be in force from and after its passage, and shall become binding as a contract between

the City of Owensboro and the Owensboro Water Works Company on condition that the said Company shall within 60 days of the passage thereof file with the City Clerk its written acceptance of this ordinance.

Approved Sept. 16th, 1895.

J. H. HICKMAN, *Mayor.*

Attest:
PHIL R. ZULAUF, *Clerk.*

90 The following communication was ordered of record:

LOUISVILLE, KY., November 25th, 1895.

To the Honorable City Council of the City of Owensboro, Ky.

GENTLEMEN: Please take notice that the Owensboro Water Works Company hereby accepts the terms and conditions of the Ordinance of the City of Owensboro passed and approved September 16th, 1895, entitled "An Ordinance providing for extending the water mains of the Owensboro Water Works Company, of Owensboro, Kentucky, and the renting of said Company of three fire hydrants;" and that the Owensboro Water Works Company also hereby accepts the terms and conditions of the ordinance of the City of Owensboro passed and approved October 29th, 1895, entitled "An ordinance amending an Ordinance entitled "An Ordinance for extending the water mains of the Owensboro Water Works Company of Owensboro, Kentucky, and renting of said Company of three fire hydrants."

Witness the signature of the Owensboro Water Works Company by its President and its corporate seal attested by its Secretary this 25th day of November, 1895.

THE OWENSBORO WATER WORKS COMPANY,
By E. CALLAHAN, *President.*

[SEAL.]

Attest:
WM. SACKETT, *Sec'y.*

Recorded in Minute Book G at page 339.

91 COMMONWEALTH OF KENTUCKY,
City of Owensboro, sct:

I, W. A. Wahl, Clerk of the City of Owensboro, State of Kentucky, do certify that the foregoing twenty- (20) pages contain true copies of seven ordinances passed by the Mayor and City Council and acceptances thereof, of date October 6, 1896, #1; February 2, 1891, #2; November 7, 1892, #3; December 6, 1892, #4; October 1, 1894, #5; May 7, 1894, #6; and September 16, 1895, #7, as the same appears from the records of my office, of which records I am the legal custodian.

Given under my hand and seal of the City of Owensboro, this eighteenth day of November, A. D. 1914.

[SEAL.]

W. A. WAHL,
City Clerk.

92 EXHIBIT "M," FILED WITH ANSWER OF DEFENDANT, CITY OF OWENSBORO.

Filed November 21st, 1914.

No. 137.

Circuit Court of the United States for the 6th Circuit and Western District of Kentucky, Owensboro Division.

THE OWENSBORO WATER WORKS COMPANY OF OWENSBORO, KENTUCKY, Complainant,

vs.

THE CITY OF OWENSBORO, KENTUCKY, Defendant.

Bill in Equity.

To the Honorable Judges of the Circuit Court of the United States in and for the Western District of Kentucky, Owensboro Division.

May it please your honor:

I.

Your Orator, the complainant, The Owensboro Water Works Company, of Owensboro, Kentucky, most respectfully states that it is a domestic corporation, created, organized, existing and doing business by and under the laws of the State of Kentucky, and by and under its Articles of Incorporation, which were duly executed and recorded in the office of the Clerk of the Daviess County Court, in the State of Kentucky, which is the county in which your said orator's place of business is situated. It was so created a corporation and organized and began business on the 3rd day of June, 1889, and by tne terms of its Articles of Incorporation its corporate existence was and is a period of twenty-five years from and after said date.

Among the powers conferred upon and vested in it by its said Articles of Incorporation, and by and under the laws of the State of Kentucky, is the right to acquire by purchase, or otherwise, and to own, maintain and operate a system of water-works in the City of Owensboro, in Daviess County, Kentucky, and to supply the defendant, the City of Owensboro, Kentucky, and the inhabitants thereof, with water for public and private purposes for the fixed period of twenty-five years from the date of its incorporation; and, likewise, it has conferred upon and vested in it the power to contract and be contracted with, and to sue and to be sued, in its corporate name. It files herewith and makes the same a part hereof a certified copy of its said Articles of Incorporation, marked exhibit # 1.

93

Your Orator further respectfully shows that the defendant, the City of Owensboro, Kentucky, is a municipal corporation created, organized and existing by and under the laws of the State of Ken-

tucky, located in the County of Daviess in said state. The said defendant was originally created a city by an act of the General Assembly of the Commonwealth of Kentucky entitled "An act to incorporate the City of Owensboro in Daviess County," which act was approved and became a law on February 16, 1866.

The said defendant was continued a municipal corporation by a further act of the General Assembly of the Commonwealth of Kentucky entitled "An act to reduce into one all of the acts relating to the City of Owensboro," which act was approved and became a law on the 6th day of March, 1876.

The said defendant was further continued as a minicipal corporation by an act of the General Assembly of the Commonwealth of Kentucky entitled "An Act creating a new charter for the City of Owensboro," which was approved and became a law on March 18, 1882.

The said defendant was further continued as a municipal corporation by an act of the General Aseembly of the Commonwealth of Kentucky entitled "An Act for government of cities of the third class," which act was approved and became a law on June 14th, 1893; and since said date the said defendant has existed as
94 a corporation by virtue of the last named act.

By The said acts of February 16th, 1866, and of March 6, 1876, the Common Council of the defendant City had conferred upon and vested in it full power to make, establish and regulate public wells, cisterns, reservoirs and pumps, and to provide for the furnishing of said city and the inhabitants thereof with water, and to prevent and guard against damage by fire, to purchase fire engines and fire apparatus, to organize fire companies and to provide by contract for the construction, maintenance and operation of a system of water works in said city for said purposes; and to grant to others the sole and exclusive privilege of laying pipes, mains and conduits in and through the streets of said city, and to attach fire hydrants ther-for, and to supply to said city water for fire protection and other public uses, and also to furnish water to the inhabitants of said city for domestic purposes. All of said powers were continued and remained vested in said city by and under the said act of incorporation of March 18, 1882.

Your Orator further shows that by Articles of Incorporation duly executed and admitted to record in the office of the Clerk of the Daviess County Court in the State of Kentucky there was created on the 9th day of September, 1878, a domestic corporation entitled "Owensboro Water Company;" that by virtue of said Articles of Incorporation and under the laws of the State of Kentucky then in force the said corporation had conferred upon and vested in it the power to contract and to be contracted with, to sue and to be sued, in its corporate name, and to build, construct and operate in the City of Owensboro, in Daviess Couny, Kentucky, a system of water works for the supply of water to said city and the inhabitants thereof, for both public and private purposes, and to have granted to and conferred upon it by said city the exclusive right, privilege and fran-

chise to lay its water pipes, conduits and other necessary ap-
95 pliances in the streets and public alleys and public places in said city, and the like exclusive privilege to furnish to said City and the inhabitants thereof water for public and private purposes, and to sell, dispose of and transfer all property or franchise which it might pos-ess of acquire under such grants from said city, or otherwise. The corporate existence of said company was by said Articles of Incorporation fixed at a period of twenty-five years from and after said 9th day of September, 1878. The capital stock of said corporation was fixed at $80,000, and the highest amount of indebtedness which it could incur was fixed at two-thirds of the capital stock. A duly certified copy of the Articles of Incorporation of the said Owensboro Water Company is filed herewith and made a part hereof, marked Exhibit #2.

Your Orator most respectfully shows that after the incorporation of the said Owensboro Water Company as aforesaid, to-wit: on the 10th day of September, 1878, the defendant City of Owensboro being thereunto fully authorized and empowered by its then charter, made and entered into a contract with the said Owensboro Water Company whereby and wherein on certain terms and conditions therein specified it granted to the said Owensboro Water Company and to its successors and assigns, for the duration of said Company, the exclusive rights, franchises and privileges to construct and operate in the City of Owensboro Water works for the supply of said City and the inhabitants thereof with water from the Ohio River for public and private purposes, and to use the streets, alleys and other public highways within the then present and future limits of said city for the purpose of laying and repairing pipes, conduits, hydrants and fountains for the supply of water. It was further provided in said contract that in consideration of the benefits which would be derived by said city and its inhabitants by the construction and operation of said water-works, and in further consideration of the risk of
96 so large an investment by said company in said City in a new and untried enterprise, the rights and privileges and franchises thereby granted to and vested in said company should remain in force and effect for twenty-five years from the passage of the ordinance embracing said contract, and that the said water Company should be exempt from the payment of all taxes which might be assessed by the defendant or levied for its use or benefit for two years from and after the date of said contract; and the said defendant by said contract did then rent from said company for fire protection one fire hydrant at each intersection of the streets along the lines of pipes required to be laid in said contract, amounting then to 62 hydrants, for and during the term of twenty-five years from the date of said contract, and agreed to pay for the first fifty hydrants at the rate of $75 each per year, and for all hydrants in excess of the first fifty at the rate of $50 each per year beginning as soon as the said water-works company be put in successful operation, which sums of money the defendant agreed to pay to said Company quarterly on the first days of January, April, July and October of each and every year during the existence of said contract; and it was further

provided in said contract that if any extension and extensions of pipes should be made by said company during the said term of twenty-five years, at the instance or request of the defendant city, then the said defendant thereby agreed and bound itself to take on the line and lines of such extensions one hydrant as soon as completed at each intersection of the streets along the whole length of such extension and extensions, and to pay therefor for the unexpired term of said franchise at the rate of $50 each per year, payable quarter-yearly, at the same times above stated in said contract as to the first 62 hyrdants. The said contract was embraced in a certain ordinance and the acceptance thereof. The said ordinace is entitled "An ordinance authorizing the construction and oper-
97 ation of water-works in the City of Owensboro, and granting certain franchises and contracts to the Owensboro Water Company." It was also provided in said ordinance, as follows: "This ordinance shall become binding upon the City of Owensboro as a contract in the event that the said Owensboro Water Company within ten days after its passage shall file with the Mayor of said City its written acceptance of the conditions of this ordinance, and after such acceptance this ordinance shall be the measure of the rights and liabilities of the said city and of the Water Company," and on the same day that the said ordinance was adopted and approved, to-wit; on the 10th day of September, 1878, the said Owensboro Water Company delivered to the Mayor of the City of Owensboro and the said Mayor presented to the Common Council of the said City, and the said Mayor and Common Council approved, the written acceptance of the provisions of said ordinance as therein provided, which written acceptance was in words and figures as follows, to-wit:

"OWENSBORO, KY., Sept. 10, 1878.

"Please take notice that the Owensboro Water Company accepts the conditions of an ordinance of the City of Owensboro, entitled "An ordinance authorizing the construction and operation of Water-works in the City of Owensboro, and granting certain franchises and contracts to the Owensboro Water Company, passed on the 10th day of September, 1878.

Very respectfully,

OWENSBORO WATER COMPANY,
By DENNIS LONG, *President.*"

By the said ordinance, which constituted the contract between the said Owensboro Water Company and the defendant, City of Owensboro, it was prescribed as to the kind of water-works plant and the method of construction, as to size of pipes, as to capacity and as to the construction of pumping apparatus and kinds of hydrants, and by accepting the terms of said contract as embraced in said
98 ordinance, the said Owensboro Water Company covenanted, agreed and undertook, and became firmly bound, to construct and operate in the City of Owensboro water-works for the supply of said city and the inhabitants thereof with water from the Ohio

River for public and private purposes, and to lay its pipes in the streets and alleys and other public highways within the then limits of said city, or the future limits thereof, and to construct its hydrants for the supply of water, and to make, provide and equip such other necessary attachments as were necessary and proper in supplying water for private purposes to the inhabitants of said City. And, by and under the authority conferred upon it in said contract, and invested in it by and under its charter and the laws of the State of Kentucky, and in the exercise of the franchise and privileges thus vested in it, it did at once proceed to construct its pumping house, to lay its pipes, to attach its hydrants and to make all necessary provisions for supplying water to the city of Owensboro for public purposes, and to the inhabitants thereof for private purposes; and in the construction and equipment of its said plant it did fully and in all respects carry out each and every stipulation in said contract contained and agreed to be done and performed by it. And it did construct said plant in all respects as by it required, and did furnish water both for public and private uses to the said city and its inhabitants as it had therein agreed and covenanted to do. It was further expressly stipulated and provided in said contract as follows:

"The said City will adopt and enforce ordinances protecting said Company in the safe and unmolested exercise of these franchises and against fraud and imposition, and against injury to the hydrants rented by it to said City, and against waste of water by consumers."

It says that by the said contract the defendant, City of Owensboro, granted to it, and there was vested in it, the sole and exclusive right to construct, operate and maintain a system of water-
99 works in the said City of Owensboro as it then existed, and in the extensions thereof, for the purpose of supplying the said city and its inhabitants with water therefrom. A certified copy of said ordinance and the acceptance of its terms by the Owensboro Water Company is filed herewith and made a part hereof, marked exhibit #3.

Your Orator further shows that it operated its said water works according to the terms and conditions in said contract set out, but that prior to July 15th 1884, certain disputes arose between it and the defendant City of Owensboro as to whether it was of the kind and capacity and efficiency stipulated in said contract, and certain litigation was instituted and pending between the said defendant and the said Owensboro Water Company, when during the pendency of said litigation, and on July 15, 1884, the said City of Owensboro duly enacted, and the Mayor of said City approved, an ordinance providing for the terms of a settlement between the City of Owensboro and the Owensboro Water Company of the litigation then pending between them. In the preamble to said ordinance it was recited in substance that both the City of Owensboro and the Owensboro Water Company were desirous of settling their respective claims and litigations, that the City of Owensboro had doubted that the power and capacity of the works of the Owensboro Water Company came up to the requirements of the contract made September 10, 1878, and that the water company claimed that its said works

had the power and capacity required by its contract and was willing to demonstrate this by public test, therefore for the purpose of ascertaining the truth regarding such disputed point and for the purpose of settling the said claims and litigations, it was ordained by the Common Council of the defendant City that F. J. Birk and J. P. Troutman be, and they were, irrevocably appointed by the City of Owensboro in conjunction with two other persons to be appointed by the Owensboro Water Company, they to select
100 a fifth person, and the said five persons, or their majority, were authorized and instructed for an- in behalf of the City of Owensboro to superintend a public test to be made by the Owensboro Water Company of its water-works in the month of August, 1884, and as arbitrators to return to said parties their answer to the questions of dispute therein specified; and it was further provided that the said finding of the said five persons, or their majority, should be final and conclusive on the part of the City of Owensboro regarding the facts of the questions so submitted to them. And, it was further provided that in the event the said finding should be that the said water works had the power and capacity by it claimed, then the claims and litigation of the City of Owensboro and the Owensboro Water Company should be at once settled upon the terms and condition in said ordinance specified; and, among the matters and things therein stipulated to be settled was the provision that the City of Owensboro should relinquish the right to require the Owensboro Water Company to erect a stand-pipe, which it was bound to do if so required by the original contract. It was further stipulated in said ordinance that in case the said Company should be thus found to have constructed water works of the capacity and up to the requirements contained in the original contract, then the said City would rent additional hydrants of said Company for the remainder of twenty-five years and pay therefor $50 per year, payable in quarterly installments as provided in the original contract. It was also expressly provided that in other respects than those in said ordinance expressly named the rights and duties of the Owensboro Water Company, should remain as defined in the water-works ordinance there-fore adopted concerning it, which to that extent were confirmed and ratified, and that the said ordinance should become binding upon the City of Owensboro as a contract in the event that the Owensboro Water Company should within ten days from the passage of said ordinance file with the City Clerk its written acceptance thereof. A duly certified
101 copy of said preamble and ordinance is filed herewith and made a part hereof, marked Exhibit #4.

Your orator further states that thereafter on the 23rd day of July, 1884, the said water works company did file with the Clerk of said City the following acceptance of said ordinance;

"To the Common Council of the City of Owensboro.

"GENTLEMEN: Please take notice, that the Owensboro Water Company of Owensboro, Ky., hereby accepts the ordinance of the City of Owensboro passed by the Common Council of said City

on the 15th of July, in the year 1884, entitled "An ordinance providing the terms of a settlement between the City of Owensboro and the Owensboro Water Company of the litigation now pending between them."

Which written acceptance, so filed with the said Clerk, was duly signed by the Owensboro Water Company by its president Dennis Long, and the same was received and accepted by the said City Clerk for and on behalf of the City of Owensboro. A duly certified copy of said acceptance and its approval by the Common Council of the defendant City is filed herewith and made a part hereof, marked Exhibit #5.

Your Orator further shows that pursuant to said contract the said Owensboro Water Company selected two other persons, and they, together with the two persons selected by the Common Council of the City of Owensboro selected a fifth person, and these five persons on August 22n-, 1884, made to the Common Council of the City of Owensboro its report of the public test made by said water company as provided in said ordinance. The said report so made was as follows:

"To the City of Owensboro, Kentucky:

"We, the committee appointed to decide as to the power and capacity of the Owensboro Water Company to comply with the series of tests embraced in section first of an ordinance in regard to the City of Owensboro and the Owensboro Water Company, have
102 to report that the said Owensboro Water Company has fully shown its power and capacity to fulfill all the tests so embraced in said section of said ordinance, and that said water Company has fully stood the test as stipulated in said section of said ordinance. And we hereby return to the parties this our award and finding.

Very respectfully,

(Signed) M. V. MONARCH.
F. J. BIRK.
J. P. TROUTMAN.
WM. CAYE.
EDW. HUGHES."

And on the 25th day of August, 1884, the said award was presented to the said City Council and was by it duly accepted, approved and concurred in. A certified copy of the said report and the action of the said City Council thereon is filed herewith and made a part hereof, marked Exhibit #6.

Your Orator further shows that by an ordinance enacted by the Common Council of the City of Owensboro on the 20th day of December, 1887, and which went into force on the 1st day of January, 1888, and in which the Owensboro Water Company concurred, it was agreed by the said Company and the said City that after the 1st day of January, 1888, the hydrant rental to be paid

to said Company by said city should be $50 each per hydrant for the first one hundred hydrants, and $40 per hydrant for each additional hydrant, and to this extent the original contract between the City and the said Owensboro Water Company was modified.

II.

Your Orator further shows that the said Owensboro Water Company continued to maintain and operate its said water-works in said city and to furnish to the said City and the inhabitants thereof water for public and private purposes, and it did in all manners and respects keep and perform the conditions, undertakings
103 and covenants in its said contract contained until June 3, 1889.

Your Orator further shows that from the time its original contract was made until the said 3rd of June, 1889, the said City of Owensboro had greatly increased in population and its territory had been so extended as to include large areas not theretofore embraced therein, and that the capital stock of the said Owensboro Water Company, and the limitations upon its right to become indebted were such that it became evident that more capital would be required to supply the rapidly growing city and the inhabitants thereof with water, and there having been duly organized and created a corporation, your Orator's the complainant herein, as hereinbefore set out, with a capital stock of $300,000, and an authorized capital of $500,000, and an authorized indebtedness of two-thirds thereof, and it then being the desire of the Owensboro Water Company and of the Owensboro Water Works Company that the said Owensboro Water Company should sell and the Owensboro Water Works Company should purchase all the property, rights, privileges, franchises and contracts then owned by the said Owensboro Water Company, and the said Owensboro Water Works Company having a much larger capital and being better able to supply the said City of Owensboro and the inhabitants thereof with water, both for private and public purposes, and it being then necessary that large extensions and improvements should be made in said water-works in said city for said purpose, and it being much desired by and greatly to the advantage and benefit of said City and its inhabitants that said sale and transfer should be made, the Common Council of defendant City of Owensboro did, on June 3rd, 1889, duly pass and adopt, and the Mayor approved, an ordinance which is in words and figures as follows, to-wit:

COUNCIL HALL, MONDAY, June 3rd, 1889.

"The following ordinance was submitted and read, whereupon on motion the rules of order were suspended as to voting on ordinances and the same, after its second reading, was enacted by the following vote, to-wit: Ayes, Messrs. Baer, Vargason, Higdon, Cullen, Decker; Noes, None.

104 Whereas the Owensboro Water Works Company, of Owensboro, Kentucky, a corporation duly organized and existing

under the laws of the State of Kentucky is ready to purchase the Water Works of the Owensboro Water Company, together with its existing contracts for supplying the City of Owensboro and the inhabitants of said City and its vicinity with water, and whereas it is desired by the said two companies in order that the said purchase may be consummated, that the City of Owensboro grant to the said The Owensboro Water Works Company, of Owensboro, Kentucky, the franchises and license to maintain, complete and operate water works in the city of Owensboro and to use the streets, alleys and other public highways within the said city for laying, repairing and taking up mains, service pipes, hydrants and other apparatus for the supply of water, and that the City of Owensboro accept the said The Owensboro Water Works Company, of Owensboro, Kentucky as the successor to the contract made by the City of Owensboro with the Owensboro Water Company for hydrant rentals; now in order to enable the said Companies to carry out their negotiations, and to vest the contracts of the Owensboro Water Company for hydrants as fully in the said The Owensboro Water Works Company, of Owensboro, Kentucky, as if they had been originally made by the City of Owensboro, Kentucky, with the said The Owensboro Water Works Company, of Owensboro, Kentucky. Be it ordained by the Common Council of the City of Owensboro: Sec.1. That in consideration of the purchase by the Owensboro Water Works Company, of Owensboro, Kentucky of the Water works of the Owensboro Water Company, the franchise and license are hereby granted to the Owensboro Water Works Company, of Owensboro, Kentucky, and to its successors and assigns, for and during the existence of the said corporation, to maintain, complete and operate water works in the City of Owensboro for supplying the City of Owensboro and the inhabitants of said ctiy and its vicinity with water for public and private purposes, and to use within the present and future limits of the City of Owensboro the streets, alleys and other public highways thereof for the purpose of laying, repairing and taking up
105 mains, service pipes, hydrants and other apparatus for the supply of water.

But there shall be no continued unreasonable obstruction of the said streets, alleys and other public highways, and after their use from time to time, they shall be restored by the said water works company as near as practicable to their former condition, and the said grant is subject to the existing right of purchase of the said water works by the said City of Owensboro.

Sec. 2. That, in like consideration of the said purchase, by the Owensboro Water Works Company, of Owensboro, Kentucky, of the water works of the Owensboro Water Company, the City of Owensboro hereby accepts the said The Owensboro Water Works Company, of Owensboro, Kentucky, as the successor to the contract for hydrant rental now existing between the City of Owensboro and the Owensboro Water Company, as fully as if such existing contracts had been originally made by the City of Owensboro with the said

The Owensboro Water Works Company, of Owensboro, Kentucky, without the intervention of the said Owensboro Water Company.

Sec. 3. That the consent of the City of Owensboro is hereby given to the consummation of the said purchase of the said water works of the Owensboro Water Company by the Owensboro Water Works Company, of Owensboro, Kentucky, and upon such consummation the Mayor and City Clerk of the City of Owensboro are hereby authorized and instructed to seal duplicate copies of the ordinance with the seal of the City of Owensboro, and to sign such copies as a contract between the City of Owensboro and the Owensboro Water Works Company, of Owensboro, Kentucky, and to accept the other in behalf of the City of Owensboro when signed and sealed by the said The Owensboro Water Works Company, of Owensboro, Kentucky.

Sec. 4. This ordinance shall take effect at its passage and publication.

JOE LEE, *Mayor.*

PHIL R. ZULAUF, *Clerk.*"

106 A certified copy of said ordinance is filed herewith and made a part hereof, marked Exhibit # 7.

Your Orator further shows that from said ordinance it appears and the truth is, that the said City of Owensboro, at the request of the said Owensboro Water Company and of the said Owensboro Water Works Company did consent to the sale and transfer of the property, rights, privileges, franchises and contracts of the Owensboro Water Company to the Owensboro Water Works Company, and did by said ordinance fully authorize, approve, and ratify said sale and transfer. Moreover, by the said ordinance and the preamble thereto, hereinbefore fully set out, it, the said City of Owensboro, did grant to the Owensboro Water Works Company the franchise and license to maintain, complete and operate water works in the City of Owensboro, and to use the streets, alleys and other public highways, within said city for laying, repairing and taking up mains, service pipes, hydrants and other apparatus for the supply of water, and the said City of Owensboro did thereby accept the said Owensboro Water Works Company as the successor to the contract made by the City of Owensboro with the Owensboro Water Company for hydrant rentals; and as an inducement to your orator, the Owensboro Water Works Company, to so purchase the property and rights, privileges, franchises and contract of the Owensboro Water Company, the said City of Owensboro by its said ordinance did specifically provide that in consideration of the purchase by the Owensboro Water Works Company of Owensboro, Ky., of the water works of the Owensboro Water Company, "the franchise and license are hereby granted to the Owensboro Water Works Company of Owensboro, Ky., and to its successors and assigns for and during the existence of the said corporation to maintain, complete and operate water works in the City of Owensboro for supplying the city of Owensboro and the inhabitants of said city and of its vicinity with

water for public and private purposes and to use within the
107 present and future limits of the City of Owensboro the streets, alleys and other public highways thereof for the purpose of laying, repairing and taking up mains, service pipes, hydrants and other apparatus for the supply of water." And the grant of the rights, franchises and privileges aforesaid were then made directly to the said Owensboro Water Works Company, and were in addition to the rights, franchises and privileges which it acquired by its purchase of the rights, franchises and privileges of the Owensboro Water Company, and extended during the whole period of its corporate existence, a period of twenty-five years from and after the 1st of June, 1889. And, by the said ordinance the said City of Owensboro in like consideration of the said purchase of your orator, the Owensboro Water Works Company, of the water Works of the Owensboro Water Company, accepted the said Owensboro Water Works Company as the successor to the contract for hydrant rental then existing between the City of Owensboro and the Owensboro Water Company as fully as if such existing contract had been made by the said City of Owensboro and the Owensboro Water Works Company on the said 3rd of June, 1889, for a period of twenty-five years and as fully as though they had been made with said company without the intervention of the said Owensboro Water Company, and by the said ordinance it was further provided that the consent of the City of Owensboro was thereby and therein given to the consummation of the said purchase of the said water works of the Owensboro Water Company by the Owensboro Water Works Company, and upon such consummation the Mayor and City Clerk of the city of Owensboro were duly authorised and instructed to seal duplicate copies of the said ordinance with the seal of the City of Owensboro, and to sign such copies as a contract between the City of Owensboro and the Owensboro Water Works Company, and to receive the other copy in behalf of the City of Owensboro when signed and sealed by the Owensboro Water Works Company: The said ordinance went into effect on the day of its passage, and thereupon the said Owensboro Water Company did sell to, and the said Owensboro
Water Works Company did purchase of it, all of its rights,
108 titles, privileges and franchises and the same was duly conveyed and transferred to it by deed from the said Owensboro Water Company dated June 10, 1889, which deed was duly acknowledged and delivered and recorded in the office of the Clerk of the Daviess County Court. A duly certified copy thereof is filed herewith and made a part hereof marked Exhibit #8.

The Mayor and Clerk of said city did duly sign and seal copies of said ordinance and deliver the same to your orator, the Owensboro Water Works Company, which signed, sealed and delivered one copy thereof to the said City of Owensboro, which it received and accepted.

Your orator most respectfully shows that by the contract embraced in the said ordinance of June 3rd, 1889, as well as the contracts existing by and between the City of Owensboro and the Owensboro Water Company, all of which was transferred to and vested

in your orator by and with the consent, and by the procurement of the said City of Owensboro, there was created and now exists between your orator and the said defendant, City of Owensboro, a valid and binding contract whereby and wherein your orator, the said Owensboro Water Works Company has acquired and now has conferred upon and vested in it the sole and exclusive right, franchise and privilege during the period of twenty-five years from and after June 1st, 1889, to maintain, complete and operate water works in the City of Owensboro for supplying the City of Owensboro, and the inhabitants of said City and its vicinity, with water for public and private purposes from whatsoever sources said water may be taken and supplied and to use within the present and furture limits of said city exclusively and solely the streets, alleys and other public highways for the purpose of laying and repairing and taking up mains, service pipes, hydrants and other apparatus for the supply of water; and it has the like sole and exclusive privilege and right to furnish all of the inhabitants of said city water for domestic purposes, and the City of Owensboro water through its hydrants
109 for extinguishing fires, and for other public purposes, and that the City of Owensboro is bound by its said contract to pay to your orator for said hydrants during the said period of twenty-five years from and after June 1st, 1889, the hydrant rentals therein specifically named, $50 per annum each for the first one hundred hydrants and $40 per annum each for the remaining hydrants. But if the said contract shall not be construed to fix the price of hydrants after the expiration of twenty-five years from the date of the original contract with the Owensboro Water Company, then your orator most respectfully states that the said contract does confer and vest in it the exclusive privilege of furnishing water through hydrants to the said City during twenty-five years from the first day of June, 1889, at reasonable prices from and after the expiration of the original contract with the Owensboro Water Company.

Your orator further shows that since the 3rd day of June, 1889 it has completed, maintained and operated at all times a system of water works in the City of Owensboro of the kind, capacity and efficiency stipulated in its contract and said ordinance as hereinbefore set out, and has at all times, unavoidable accidents excepted, furnished to the inhabitants of said city, and to the said City, Water for domestic purposes; that it has expended large sums of money and that its said plant is now of the value of more than $250000; that it has laid and now has in operation twenty-two miles of pipe; and that it has established and is now maintaining, ready at all times, for fire protection, 163 hydrants,

III.

Your orator, showing and claiming the rights, franchises, privileges and contract set out in the first two paragraphs of this, its bill, and showing that it has kept, performed and done each and every act of it by said contracts required, now most respectfully shows that it is ready, willing and able to continue to carry out its said con-

tract and to continue to perform and do all the things of it
110 required therein until the expiration of said contract on June 1st, 1914, and therefore, it comes and complains of the defendant, the City of Owensboro, and for complaint states that on the 10th, day of October, 1900, the Common Council of the City of Owensboro passed, adopted and the Mayor approved, a certain ordinance entitled "An ordinance providing for obtaining the assent of the voters of the City of Owensboro, to authorize the Common Council thereof to borrow money by issuing the bonds of said city for the purpose of erecting a system of Water Works for supplying the City of Owensboro and the inhabitants thereof with water."

A duly certified copy of said ordinance is filed herewith and made a part hereof, marked exhibit #9. The said ordinance provided for a special election to be held in the City of Owensboro, at the several voting places therein, on the first Tuesday after the first Monday in November, 1900, to ascertain whether or not two-thirds of the votes of said City, voting at said election, on the proposition, "Do you assent to the proposition that the City of Owensboro shall issue $200000 of its bonds, for the purpose of borrowing money to be used in the erection of a system of water works for supplying the City of Owensboro and the inhabitants of said city with water?"

The said ordinance also made provisions for the submission of said proposition to the voters of said city, and directed how the bonds if authorized should be executed and disposed of. A duly certified copy of said ordinance is filed herewith and made part hereof marked Exhibit #I.

Your Orator further shows that afterwards on the 3rd of December, 1900, the common council of the defendant city passed, enacted, and the Mayor of said City approved, a certain other ordinance entitled "An Ordinance authorizing and directing the issue and sale of the bonds of the City of Owensboro, and appropriating $14666.66 out of the revenues and public moneys of the City for the payment of the semi-annual interest thereon and the creation of a
111 fund for the ultimate payment of the principal thereof."

In the said ordinance is recited, and the Mayor and Common Council determined that the vote taken under the ordinance of October 10, 1900, was in favor of the issue of said bonds, and that the said Mayor and Common Council were empowered and authorized to issue said bonds and that said bonds should be issued pursuant to said original ordinance and the ordinance of December 3, 1900, and it was provided and determined by said common Council in said ordinance that it was then advisable for the common council to issue said bonds to the amount of $200000 for the purpose of erecting, building and acquiring a water works plant and system for the purpose of supplying the City of Owensboro and the inhabitants thereof with a sufficient amount of wholsesome water for all public and private uses; it was also resolved by the said Common Council that it was necessary to levy and collect an annual tax sufficient to raise the sum of $8000 per annum for the payment of interest on said bonded debt thereby to be created, and also the further sum of $6666.66 for the creation of a fund

for the ultimate payment of said bonds And, it was also further ordained that said bonds be then issued as soon as practical after the 1st of January, 1901, and sold and delivered for the best price possible, not to be less than par, and that the proceeds should be paid into the City Treasury to the credit of a fund to be designated Owensboro Water Bond Account. And by the said ordinance the said council did proceed to levy the taxes therein specified upon all the taxable property in said city for said purposes and provide that the said levy should continue from year to year until all the interest and bonds should be paid up. A duly certified copy of said ordinance is filed herewith and made a part hereof marked exhibit #11.

Your orator further shows that the City of Owensboro did proceed to cause to be issued $200,000 of its bonds to be due and payable thirty years after the 1st day of January 1901, to bear interest
112 at the rate of 4% per annum, payable semi-annually, from said date, the said bonds being made payable at the pleasure of the City after ten years from said date. And these bonds have been delivered to the City treasurer and the said city has been making diligent effort to sell and dispose of the same for the purpose of building, constructing and erecting a system of water works in said city, but your orator has been advised, and charges the fact to be, that the said City has not disposed of said bonds or any part thereof.

Your Orator further shows that in furtherance of its plan to build and construct such water works the said common council did on December 8, 1902, pass and adopt a resolution for and on behalf of said city directing the water and light committee to employ and report the employment of a competent water works engineer for the purpose of preparing plans, surveys and specifications of a water plant for supplying the city and the inhabitants thereof with water; also direc*i*tng said committee to examine and report on a suitable site for a pumping station and reservoir and the probable cost thereof; and to report estimates of the probable cost of the buildings and reservoir and stand pipe and boilers, engines, pumps and pipe system. And said committee was further authorized by said resolution "to enter into negotiations with Owensboro Water Company, alias Owensboro Water Works Company, for the purpose of all its property in and near the City of Owensboro, its pumping station, ground, pipe system, valves and hydrants, etc., to be conveyed to the city free of all debts, liens or claims *fo* creditors, with surrender and cancellation of all stocks and bonds, at a price not exceeding $90,000, and report their action to the Common Council and any proposition submitted by said corporation to said committee." It was then further resolved by said Common Council that the finance committee should proceed to sell the bonds at the best price obtainable, not less than par, and to direct the payment of the money therefor to the city treasurer.
113 Duly certified copies of said resolutions are filed herewith and made a part hereof, marked exhibit #12.

Your Orator further shows that in further pursuance of its said plan to construct water works in said city, the said defendant did by its common council on the 2nd day of February, 1903, adopt the

following resolution: "Resolved that the Water Works Committee be and it is hereby authorized to employ persons for the purpose of having an 8 or 10 inch well drilled to cost about $850.00 for the purpose of ascertaining whether good water can be obtained for supplying the city and citizens of the City with water suitable for domestic and manufacturing purposes."

A certified copy of the said resolution is filed herewith and made a part hereof, marked exhibit #13. And in furtherance of said plans the said defendant did by and through its common council on May 8, 1903, ratify the purchase which had been made by its committee from Elmer Miller and wife by the City of Owensboro of a parcel of ground containing three and one fourths acres at a price of $1,650, which sum was allowed to said Miller as the price of said land; said land was purchased by said City for the purpose of being used as part of the lands to be acquired by it on which to sink wells and to erect a pumping station as a part of its system of water works; and at the same time the said Council resolved that the City adopt the deep well system for the water works which it prop-sed to construct. A duly certified copy of said proceedings and resolutions is filed herewith and made a part hereof, marked exhibit #14.

Your Orator further shows that the City of Owensboro has purchased and taken a deed to a certain other tract or parcel of land, purchased of one Chas. Broeker, which adjoins the tract of land bought of said Miller, which last tract of land consists of six acres, and for which the city has paid Broeker the sum of $4,100.

Your orator further shows that on May 9, 1903, the Common Council by its resolution authorized the sinking of other deep
114 wells on the said two tracts of land. A duly certified copy of said resolutions is filed herewith and made a part hereof, marked Exhibit #15.

And, afterwards on June 8, 1903, the said Common Council by its resolution authorized and directed the sinking of other deep wells on the said two tracts of land. A certified copy of said resolution is filed herewith and made a part hereof, marked exhibit #16.

Your orator further shows that on the 17th day of August 1903, the Common Council of the City of Owensboro enacted and adopted, and the Mayor thereof, approved, an ordinance entitled "An ordinance providing for the erection and maintenance of a pumping station with all necessary machinery and the laying of pipes and mains in the streets, alleys and public places in said city, for the purpose of supplying said city and the inhabitants thereof with pure water for extinguishing fires and domestic and manufacturing purposes." By the said ordinance it is provided that there shall be erected as soon as practicable near and east of the City of Owensboro (where the lots purchased by the City as aforesaid are located) on grounds owned by the City and to be purchased, a pumping station, with all the necessary building, engines, boilers, pumps, pipes and conduits and other machinery for the purpose of procuring and supplying to the City of Owensboro and the inhabitants of said city, through pipes, mains and conduits laid in the streets, alleys and public ways and places in said city, pure water for extinguishing fires,

the use of the school houses, flushing of sewers, sprinkling the streets and other public uses, and for all domestic purposes, and for supplying miles, factories and manufacturing establishments, at just prices to be hereafter fixed by the Common Council; and said property shall be and forever remain the property of the City of Owensboro, and shall never be sold, rented, leased or otherwise disposed of by the City; and the prices to be charged for water supplied by the City by said plant shall never exceed the cost and expense of
115 operating and maintaining said plant and the payment of taxes thereon and making such repairs, additions and extensions as public necessity may require. A duly certified copy of said ordinance is filed herewith and made a part hereof, marked exhibit #17.

Your orator further shows that under the ordinance and Articles of Incorporation and charters, set out in the first and second paragraphs of this bill, it had acquired and now has the sole and exclusive right, franchise and privilege to occupy the streets of said City with its water pipes, mains and hydrants and to furnish water to the City of Owensboro and its inhabitants, for public and private purposes, but your orator most respectfully shows that even if it shall be construed that its rights, privileges and franchises are not exclusive, then nevertheless, it most respectfully shows that the said defendant city being thereunto authorized did by the ordinances aforesaid make and enter into a valid and binding contract with this complainant whereby & wherein an obligation was created on the part of this complainant to lay its pipes, conduits and hydrants in and on the streets of said City and to furnish therefrom for a period of twenty-five years from and after the 1st day of June, 1889, water for all public and private purposes to the said City and to its inhabitants, and the assuming of this obligation was the consideration for the grant by the said City to your complainant of the rights, privileges and franchises aforesaid. And it further complains and shows that each and every one of the ordinances and resolutions in this paragraph of its bill set out, and the determination and purpose of said city to build and construct a system of water works of its own and to use the streets, alleys and public places for the purpose of laying its pipes therein and establishing its hydrants thereon, and its purpose to furnish water for the extinguishment of fires and other public purposes, and for domestic purposes, is in violation of the contract existing between your complainant and the said defendant, and an impairment thereof; and that each and every one of
116 said ordinances by reason thereof are null and void and contrary to the provisions of the Constitution of the State of Kentucky, and to section 1, Article 10 of the Constitution of the United States, which prohibits the passage of any law impairing the obligation of contracts. And the same is in further violation of the Constitution of the United States in that it deprives your complainant of its property without due process of law and in that it denies to your Complainant the equal protection of the law.

Your Orator further shows that the defendant City has had plans and specifications made as aforesaid at a cost of about $2,000 and has

purchased the two pieces of real estate aforesaid at the cost of $5,750.00 and it has already caused to be sunk as many as eight deep wells at a cost of $6,400.00 and is now sinking other wells, thus it has already expended as much or more than the sum of $14,150.00 towards the construction and equipment of its said plant.

And, your orator further shows that it is the avowed purpose of the said City, as set out in the ordinance aforesaid, to construct and equip its said plant entirely and exclusively by taxes levied on the property in the City of Owensboro and collected from the owners thereof, and to occupy the same streets, alleys and public places with its pipes, conduits and hydrants that are now occupied by your complainant, and to furnish water for the extinguishment of fires instead of taking such water from your complainant during the remainder of its contract; and to enter into competition with your complainant for the furnishing of water to all persons and corporations for domestic purposes, and to charge therefor as averred in said ordinance only such sum as will pay the operating expenses of said plant when constructed, the taxes thereon, and the improvements and extensions thereof, and thus will the said city fix such rates and charges as to materially, if not completely, destroy the property of your complainant and its business and render it impossible for it to operate said water works plant without incurring great loss in so doing,
117 and this will its property be, in effect, confiscated and taken from it in violation of its right under its said contracts, and thus will it be deprived of its property without due process of law and be denied the equal protection of law.

Moreover, your orator most respectfully shows that it is a citizen and tax-payer in the City of Owensboro, and that its property is located in said city, and that its said property is annually assessed for a large sum and the city annually levies and collects large sums from it in the way of taxes, and thus will it be made to contribute large sums of money to the establishment of the defendant's municipal plant, the construction of which will destroy the value of your complainant's property, and this largely at its own expense by reason of such taxation.

Your orator says that the expenditure made by the defendant already in the construction of its said Water Works system, and those proposed to be made by it, are unnecessary and wasteful, that no necessity exists for the construction of a water works plant by the said City for the reason that said City and its inhabitants are now well and efficiently supplied with water, both for public and private uses, by the plant now owned and operated by your Complainant.

Your Complainant further shows that unless the defendant, City of Owensboro, be immediately restrained and enjoined it will proceed to sell and dispose of the $200,000 of bonds and to erect its pumping stations and to enter upon the streets, alleys and public places of said city now occupied by your Complainant with its pipes, conduits and hydrants, and will lay its own pipes, conduits and hydrants in said streets, and will proceed to equip its said plant and enter into competition with your complainant as aforesaid thus destroying the value of its property.

Your orator further most respectfully shows that the said City of Owensboro has at the cost of nearly $300,000 within the last three years constructed within said city about ten miles of
118 asphalt and macadam streets, all of which money has been raised by taxation, and the entering upon and taking of said streets for the purpose of laying its pipes, conduits, turnouts and hydrants will almost totally destroy said streets, and the same will have to be replaced at a large additional cost to the taxpayers of said city and of this defendant, which will entail and addition- burden in the way of taxation in the aggregate of not less than $200,000.00.

IV.

Your orator further most respectfully shows that on the 7th of September, 1903, the Common Council of the City of Owensboro passed and adopted the following resolution: "Resolved by the Common Council that the City Attorney be and he is authorized and empowered to commence proper legal proceedings for the condemnation of the property of the Owensboro Water Company, or Water Works Company and for the appointment of a Receiver, for a sale of the property of said Company, for the winding up of the affairs of said Company and the settlement thereof and a distribution of its assets amongst its creditors." A certified copy of said resolution is filed herewith and made part hereof, marked exhibit #18.

Your Orator most respectfully submits that from said resolution it is uncertain as to the party for whose benefit such condemnation proceedings are authorized to be instituted, and that it is uncertain and indefinite, and from said resolution your orator is not advised for what purpose it is proposed to condemn its said water works. It says that by reason of the uncertainty and ambiguity of said resolution it does not know and cannot state whether said condemnation proceedings are to be had for and on behalf of said city, or for or on behalf of some other party, or whether said condemnation proceedings are to be had for the purpose of simply condemning said
119 water works plant and causing it to be removed from said city and from the streets, alleys and public places thereof, to make room for defendant's plant, or whether it is proposed to condemn the same for the use of the said city as a water works to be owned by it, but in either event, your orator most respectfully shows that the city has not had conferred upon or vested in it any legal power or authority to institute or cause to be instituted such proceedings, or to cause to be condemned its water works plant, property, or franchise, or any part thereof, for any purpose, or to cause a receiver to be appointed, or a sale of its property or franchise to be had, or to cause the affairs of your complainant to be settled, or to cause a distribution of its assets to be made among its creditors, and defendant city has no interest in any of said questions.

Your Orator further most respectfully shows that neither at the time the said contract was made with the Owensboro Water Company as aforesaid, nor at the time the contract was made with your complainant, the Owensboro Water Works Company, was there con-

ferred upon or vested in the City of Owensboro under its then charters, or by any other law, any right, power or authority to exercise the right of eminent domain, or to institute or cause to be instituted proceedings for the condemnation of any property whatsoever, except real estate for the use of streets and alleys in said city; nor was there conferred upon or vested in it by either of the charters in force at the time said contracts were made respectively any authority to condemn the pipes lines, pipes, conduits, hydrants, or other personal property, or the franchises granted by said contracts and now vested in your complainant.

Your Orator most respectfully shows that in the contract made and entered into by and between the defendant city and the Owensboro Water Company, it was provided as follows: "The said city shall have the option and privilege at any time after the expiration of ten years from the passage of this ordinance to purchase the said water works with all its property and franchises, the price to
120 be ascertained in the following manner: Three disinterested persons of good intelligence, not residents of Owensboro or of Daviess County, Kentucky, shall be chosen, one of them by the City, another by said Company, and a third by the first two; and the three or their majority shall make an award, to the amount of which shall be added ten per centum thereof; and the said City shall have the option of refusing to purchase after said award shall have been made, or to pay to said Company in cash within three months from the date of said award the said award and in addition the said ten per centum; but in that event the said City shall assume as a part of the sum to be paid and shall pay the bonded and floating indebtedness of said Company." Said Contract was made and entered into in view of and on the faith of the law in force at said time, and with knowledge upon the part of each of the said contracting parties that the said City did not have conferred upon or vested in it the right of eminent domain or any other legal right, power or authority to condemn the property of your complainant during the terms of its corporate existence and for these reasons alone was said option recited in said contract. Moreover, your orator shows that the defendant city has not elected to exercise the option which it has under said contract in any manner whatever.

Your orator further most respectfully shows that that it can not be deprived of its property, nor can the same be taken from it by the said City except in the manner provided in said contracts as aforesaid, and that its rights growing out of said contracts and the laws in force at the time and the same were made are fully reserved to it by the present charter of the City of Owensboro, which became a law on the 14th day of June, 1893, as aforesaid, which provision is Section 3258 of the Kentucky Statutes, and is as follows:

"Sec. 3258. Rights and liabilities under pre-existing charters.
The repeal of any law by the provisions of this law shall
121 not in anywise be so construed as to effect any right or liability acquired or accrued thereunder by or on the part of the city, or any person or body corporate. This law shall not in

any manner affect any right, lien or liability accrued, established or subsisting under and by virtue or previous charters or amendments thereto, or ordinances passed thereunder; but such right, lien or liability shall be enforced, and such action or proceeding shall be carried on, in all respects as if this law had not taken effect; nor shall this law be in anywise so construed as to affect the right or liability acquired or accrued under previous charters or amendments thereto, or ordinance passed thereunder, on the part of the city or any person or body corporate."

Therefore, your orator most respectfully shows that even *it if* should be determined that the charter of the defendant now in force confers upon it the right of eminent domain for the purpose of condemning its property, the said resolution is in violation of its reserved rights retained in said charter as aforesaid, and is an attempted violation and impairment of the contract existing between your complainant and the said defendant, and if carried out will result in denying to your complainant the equal protection of the law and of the taking of its property without due process of law; and is in violation of the Constitution of the United States of America and the Amendments thereto.

But your Orator most respectfully shows that there is not conferred upon or vested in the defendant city under its present charter of June 14th, 1893, or by or under any other law, any power, right or authority to condemn its property, or any part thereof. The only provision in the charter of the defendant now in force, conferring upon or vesting in it the right of eminent domain, is section 3240, of the Kentucky Statutes which is a- follows: "All cities included in this act shall have and exercise the right of emi-ent domain in all cases where it may be necessary to acquire real estate for public purpose, or to protect the city against public nuisance, the proceedings to be the same as in cases for the right of
122 way by railroads, under the general law; in all cases where real estate is so acquired a fee simple title shall vest in the City."

Now your orator respectfully shows that the general law for condemning property in case of the right-of-way of railroads referred to in section aforesaid is embraced in Sections 835-836-837-838-839 and 840 of the Kentucky Statutes, which Sections respectively are as follows:

"Sec. 835. When any company authorized to construct a railroad shall be unable to contract with the owner of any land or material necessary for its use for the purpose thereof, it shall file, in the office of the Clerk of the County Court, a particular description of the land and material sought to be condemned, and may apply to the county Court to appoint commissioners to assess the damages the owner or owners thereof may be entitled to receive, and thereupon the said court shall appoint three impartial housekeepers of the county who are owners of land, and who shall be sworn to faithfully and impartially discharge their duties under this law."

"Sec. 836. It shall be the duty of said Commissioners to view the land and material, and to award to the owner or owners the value

of the land or material taken, which shall be stated separately; and they shall also award the damages, if any, resulting to the adjacent lands of the owner, considering the purposes for which it is taken; but shall deduct from such incidental damages, the value, if any, of the advantages and benefits that will accrue to such adjacent lands from the construction and prudent operation of the railroad proposed to be constructed. They shall return a report, in writing, to the office of the Clerk of said court, stating their award, and shall describe, in their report, the land and material condemned, give the names of the owners, and whether non-residents of the State, infants, of unsound mind, or married women."

123 "Sec. 837. Upon the application of said Company, and upon filing such affidavits as may be necessary, the Clerk of said Court shall issue process against the owners to show cause why the said report should not be confirmed, and shall make such orders as to non-residents and persons under disability as are required by the Civil Code of Practice in actions against them in the Circuit Court."

"Sec. 838. At the first regular term of the County Court, after the owners shall have — summoned the length of time prescribed by the Civil Code of Practice before an answer is required, it shall be the duty of the court to examine said report, and if it shall appear to be in conformity to this law, and to the extent that no exceptions have been filed thereto by either party, it shall confirm said report as against the owners not excepting."

"Sec. 839. When exceptions shall be filed by either party the court shall forthwith cause a jury to be empaneled to try the issues of fact made by the exceptions, and each juror shall be allowed one dollar per day for his services, to be taxed as cost, "In assessing the damages the jury shall be governed by the rule prescribed in section eight hundred and thirty-six of this law; and upon the request of either party, may be sent by the court, in charge of the sheriff, to view the land or material. If sucficient cause be not shown for setting aside the verdict, the Court shall render judgment in conformity thereto, and shall make such orders as may be proper for the conveyance of the title upon the payment of the damages assessed. Either party may appeal to the Circuit Court, by executing bond as required in other cases, within thirty days, and the appeal shall be tried de novo, upon the conformation of the report of the commissioners by the County Court, or the assessment of damages by said court, as herein provided, and the payment to the owners of the amount due, as shown by the report of the commissioners when confirmed, or as shown by the judgment of the County

124 Court. When the damages are assessed by said court, and all cost adjudged to the owner, the railroad company shall be entitled to take possession of said land and material, and to use and control the same for the purpose for which it was condemned, as fully as if the title had been conveyed to it. But when an appeal shall be taken from the judgment of the County Court by the Company, it shall not be entitled to take possession of the land or material condemned until it shall have paid into court the damages as-

sessed and all costs. All money paid into Court under the provisions of this law shall be received by the Clerk of the Court, and held subject to the order of the court, for which he and his sureties on his official bond shall be responsible fo- the persons entitled thereto."

"Sec. 840. The appeal from the county court shall be taken by filing with the Clerk of the Court to which the appeal lies a statement of the parties to the appeal, and a transcript of the orders of the county court, and thereupon the said clerk shall certify to the Clerk of the County Court that said appeal has been filed, and the clerk of the county court shall immediately transfer the original papers to the clerk of the court to which the appeal is pending; and if the owner on his appeal shall fail in the Circuit Court to increase the amount of damages awarded in the County Court, he shall pay all costs of the appeal; if the damages are increased in the Circuit Court, the other party shall pay all the costs of the appeal. This same rule as to payment of costs shall apply when the appeal is prosecuted by the party seeking to condemn land."

Your Orator further most respectfully shows that by and under the statutes aforesaid the State of Kentucky has conferred upon the city of Owensboro, and it has vested in it, only the right to acquire real estate in cases where the same may be necessary for public purposes, or where it is necessary to protect the city from public nuisance.

Your orator further respectfully shows that its property consists of one lot of real estate situated in the said city upon the banks of the Ohio River, and of the improvements and machinery thereon consisting of a brick house, a pumping station, engines, boilers, pumps, suction pipes and other necessary machinery, tools and applicances used in the operation of said pumping station; also of another lot or parcel of ground in said city situated about
125 three-quarters of a mile from the said pumping station; also a certain other lot or parcel of land lying east of the city about one mile distant therefrom; also of its pipe lines, consisting of mains, conduits, valves, turn-outs, hydrants and other attachments, which pipe-system is under-ground in the streets and alleys and other public places of said city, and which is of great value to it and indispensibly necessary for the purpose of operating its said plant and carrying out its corporate purposes. Its property also consists of a valuable franchise granted to and vested in it under its contracts in this bill hereinbefore set out; also of personal property and money and contracts of value.

Your orator most respectfully shows that there is not conferred upon or vested in the defendant city any right, power or authority to take by condemnation, or otherwise, the corporate franchises, personal property, machinery, pipe-lines of this complainant, nor is there conferred upon it or vested in it the power or authority to condemn or take any personal property, or any property, which is already devoted to a public use, and it says that all its property, except the two vacant parcels of ground, aforesaid, is devoted to the public use of supplying the said city and its inhabitants with water for public and private purposes.

Your orator further shows that the resolution hereinbefore set out casts a cloud upon your complainant's title and greatly impairs the value of its property, rights, franchises and privileges and if the defendant city is not restrained and enjoined from carrying into execution the provisions of said resolution the complainant's property will be taken without due process of law and your complainant will be denied the equal protection of the laws, and such taking will be an impairment and violation of the contracts existing between your complainant and the defendant hereinbefore set out.

Your Orator further most respectfully shows that it is the intention, design and fixed purpose of the said City to proceed at once to construct a system of water works of its own, as set out in the third paragraph of this Bill, or to proceed to condemn the
126 water works plant of your complainant to the end that the same may be wound up and its corporate existence terminated and its property taken from it, or else it is the intention, design and purpose of said city to condemn and take the water works plant of your complainant to be used by said city as its own system of water works, the one or the other of said *states* of case is true, but your orator does not know and cannot state which is true. For it states that by the ordinances and resolutions set out in the third paragraph hereof it has ordained and resolved to construct a new system of water works and has had plans and specifications made therefor, and under the resolution set out in this paragraph it is threatening to institute in the County Court of Daviess County, Ky., proceedings to condemn Complainant's water works property and these two things it is threatening to do and is doing at the same time with the purpose and intent to deceive and mislead your complainant as to which of said things it will do.

Your Orator further shows that if the provisions of defendant's charter aforesaid and the sections of the Kentucky Statutes providing for the procedure thereunder as aforesaid shall be construed to confer upon or vest in the defendant the right of eminent domain for the purpose of condemning your complainant's said property, then the said sections of said Statute are null and void because of their repugnance to the Constitution of the State of Kentucky, and to the constitution of the United States, and the Amendments thereto in that no provision is made in said statute for ascertaining or allowing any compensation for your complainant's corporate franchise which is of great value, and by reason thereof a condemnation of the property under said Statutes would be a taking thereof without due compensation.

Your orator further respectfully shows that if the relief sought herein is not immediately granted to your Complainant, the said City of Owensboro will immediately proceed to do the things
127 set out in either the third paragraph of this bill under the ordinances and resolutions therein set out, or the things set out in this, the fourth paragraph of this bill, and, in either event and whether the city does the one or the other of said things, great and irreparable injury will result to your complainant. Your Orator further shows that no previous injunction has been

asked for, granted or refused by this or any other court or by any judge *of* clerk.

Wherefore, your complainant now humbly prays that it may please your Honors to grant to your orator a writ of injunction pendente lite issuing out of and in accordance with the rules and practice of this Honorable Court to be directed to the said defendant, City of Owensboro, in Kentucky, to restrain it, its agents, servants and employees from selling or disposing of the $200,000 of bonds in this bill mentioned, or any part of said bonds, and from levying or collecting any taxes from this complainant, or from any other of the tax payers in the City of Owensboro, for the purpose of creating a sinking fund for the redemption of said bonds, and also from entering upon the streets, alleys and other public places in said city for the purpose of and also from laying therein any of its pipes, conduits, turnouts, and from constructing and maintaining hydrants or other appliances, and from constructing, equipping, operating or maintaining a system of waterworks in said city at any time until after the 1st day of June, 1914; and also from disregarding and violating its contracts existing between it and your orator as set out in this bill. And your orator further prays your Honors to determine and adjudge that each and every one of the ordinances and resolutions set out in the third paragraph of this bill, and the resolution set out in the fourth paragraph of this bill, are null and void and of no force and effect. And that your Honors by your restraining order enjoin the said defendant from proceeding further under said ordinances, either to issue said bonds, to levy said taxes, or to enter upon said
128 streets, and from pretending, claiming or asserting that the said ordinances or resolutions, or any of them, are valid or binding for any purpose; and that at the final hearing such restraining order and injunction may be made perpetual.

And your orator further prays that it may please your Honors to grant to your orator a writ of subpœna, issuing out of and under the seal of this Honorable Court, to be directed to the said City of Owensboro commanding it on a certain day and under certain penalty, in the said writ to be inserted, to be and appear before your Honors in this Honorable Court, and then and there full, true and perfect answer make, to all and singular the premises, and further, to stand, to perform and abide such further orders, directions, injunctions and decrees therein, as to your honors shall seem meet, and shall be agreeable to equity and good conscience.

And your orator further humbly prays that it may have such other and further relief, preliminary and final, as to the Court may seem meet and proper and which equity may require, and for costs, and it will ever pray.

W. T. ELLIS,
C. M. FINN, AND
J. D. ATCHISON,
Attorneys for Complainant.

STATE OF KENTUCKY,
County of Daviess, sct:

James J. Sweeney being duly sworn according to law deposes and says: I am President of the Complainant, Owensboro Water Works Company, in the foregoing bill and have read said bill and the same is true to my own knowledge, except such matters
129 as are therein stated on information and belief, and as to such statements, I believe them to be true.

JAMES J. SWEENEY.

Subscribed and sworn to before me by James J. Sweeney, this the 21st day of September, 1903.

DUDLEY LINDSEY,
U. S. Com'r.

UNITED STATES OF AMERICA,
Western District of Kentucky, ss:

I, A. G. Ronald, Clerk of the District Court of the United States for said Western District of Kentucky, do hereby certify the above and foregoing to be a true and complete copy of the Bill in Equity, filed in said court, on the 21st day of Sept., A. D. 1903, in the cause wherein The Owensboro Water Works Company, — the complainant, and City of Owensboro, Ky., — the Defendant, as the same appears from the original now remaining in my custody and control.

In Testimony whereof I have hereunto set my hand and affixed the seal of said court, this 10th day of November, A. D. 1914.

A. G. RONALD, *Clerk*,
[SEAL.] By M. E. DUNN, *D. C.*

130 EXHIBIT "N," FILED WITH THE ANSWER OF DEFENDANT, CITY OF OWENSBORO.

Filed November 21st, 1914.

Circuit Court of the United States for the 6th Circuit and Western District of Kentucky, Owensboro Division.

No. 137.

THE OWENSBORO WATER WORKS COMPANY OF OWENSBORO, KENTUCKY, Complainant,
vs.
THE CITY OF OWENSBORO, KENTUCKY, Defendant.

To the Honorable Judges of the Circuit Court of the United States in and for the Western District of Kentucky, Owensboro Division:

May it please your Honors:

Your Orator, the Complainant, Owensboro Water Works Company, of Owensboro, Kentucky, comes by leave of Court before

answer and amends the II paragraph of its Bill of Complaint herein by inserting after the words "at all times for fire protection, 163 hydrants," the following:

Your Orator, the complainant, Owensboro Water Works Company of Owensboro, Kentucky, further shows that since the 3rd day of June, 1889, it has, under ordinances of defendant City directing it to do so, extended its pipe system and placed fire hydrants thereon as follows:

On November 1, 1892, one at the intersection of Twelfth and Allen Streets; one at the intersection of Main and Hathaway Streets; one at the intersection of Twelfth and Walnut Streets;

November 21, 1892, one fire hydrant at the intersection of Littles Avenue and Elm Streets;

On May 7, 1894, one fire hydrant at the intersection of Main and Orchard Streets;

On December 17, 1894, one at the intersection of Hathaway and Eighth Streets; one at the intersection of Fifth Street and Leitchfield Road; one at the intersection of Jackson and Sixth
131 Streets; one at the intersection of Jackson and Seventh Streets; one at the intersection of Jackson and Eighth Streets; one on Oglesby Street;

On September 16, 1895, one at the intersection of McFarland and Center Streets; one at the intersection of Maryland and Sweeney Streets; one at the intersection of Maryland and Mosley Streets.

That in extending its said system and placing hydrants thereon, it did so at the request and by the direction of the defendant City of Owensboro, which designated the sizes of the pipes the Complainant Company should use in the streets and the location of the hydrants by ordinances duly enacted and passed by the defendant City Council.

Certified copies of ordinances directing the said extensions of its pipe system and the location of fire hydrants are filed herewith and made part hereof, numbered, 1, 2, 3, 4, 5, and 6, 7 and 8 respectively.

Your Orator further shows that in said ordinances directing said extensions and placing of said hydrants the defendant City of Owensboro agreed and promised to pay to the Complainant $40. per annum for each of said hydrants from the time they were put up and connected with its water works system during the unexpired term of the franchise and corporate existence of Complainant Company, payable on the first days of January, April, July and October of each year.

Complainant says that it duly accepted the terms and conditions of said ordinances and wherever the City required the same to be accepted in writing, complainant gave its written acceptances; and it has been furnishing water to said City from said hydrants together with all the other hydrants which had been erected and then in use, but notwithstanding it has furnished water to said City of Owensboro, said city has refused and is now refusing to pay Complainant its hydrant rentals for the water so furnished.

132 Your Orator further shows that it has, since 1889, placed other hydrants upon pipe lines in the City of Owensboro, as it was required and directed to do by the said City, and it has expended, in placing its hydrants and extending its pipe system and making improvements to carry out its contract with the City of Owensboro, over $30,000 in addition to the original investment.

Wherefore Your Orator prays as it has before prayed *as* in its original Bill of Complaint and that said defendant City of Owensboro may answer, but not under oath, such being hereby waived, according to the practice of this Court, all and singular the matter stated and charged in said original Bill of Complaint and those hereinbefore stated and charged in this Your Orator's amended Bill of Complaint.

W. T. ELLIS,
J. D. ATCHISON,
C. M. FINN,
Att'ys & Solicitors for Complainant.

STATE OF KENTUCKY,
County of Daviess, sct:

James J. Sweeney, being duly sworn according to law deposes and says, I am president of Complainant Owensboro Water Works Company, in the foregoing amended Bill of Comp-a-nt and have read such bill and same is true, of my own knowledge, except such matters as are stated either on information and belief.

JAMES J. SWEENEY.

Subscribed and sworn to before me by James J. Sweeney, this the 21st day of October, 1902.

[SEAL.] MARY HAGER, *N. P.*

My commission expires March, 1st, 1904.

133 **No. 1.**

COUNCIL HALL, Nov. 7th, 1892.

The Council met in regular session with Mayor Hickman and all the members present except Mr. Stirman.

Mr. Stirman came in and took his seat.

The following ordinance was submitted and read whereupon on motion the rules of order as to voting on ordinances were suspended and the same after its second reading was adopted by the following vote, to-wit: Ayes, Mes. Decker, Norton, Hill, Smith, Crauz; Noes, Mr. Stirman.

Be it Ordained by the Mayor and Common Council of Owensboro:

Sec. 1. That the city of Owensboro hereby requests and orders the Owensboro Water Works Company, of Owensboro, Ky., to lay in the streets of said city of Owensboro the following six inch mains, to-wit:

On Walnut Street from Little Avenue to Elm Street.
On Twelfth Street from Walnut to Elm Street.
On Main Street from Centre to Hathaway Street.

And the City of Owensboro furthe- requests and requires the said water Company to put up at the places hereinafter set forth the following fire hydrants; to-wit, One at the intersection of Twelfth and Elm Streets, one at the intersection of Twelfth and Walnut Streets, one at the intersection of Main and Hathaway Streets, The City of Owensboro shall indicate to the Owensboro Water Works Company in due time the proper curb line at the respective locations of all the above designated three fire hydrants where the curbing is not already laid, and shall also indicate to the said Water Company the proper and correct grade on any and all of the streets on which the mains are ordered to be laid as herein specified, and on which the grade may not have been definitely made and established at the time the said Water Company shall
134 be ready to commence laying the mains on the respective streets.

Sec. 2. In consideration of the compliance of the said Water Company with the said requests and requirements of the city of Owensboro as herein set forth the City of Owensboro hereby rents of the Owensboro Water Works Company the above named fire hydrants for the unexpired term of the franchises of the said water Company, beginning with the date when such hydrants shall be respectively put up and connected with the water works of the Owensboro Water Works Company and promised to pay therefor at the rate of forty dollars ($40.) each per annum, payable quarterly on the first days of January, April, July and October of each year.

Sec. 3. This ordinance shall take effect from its passage and publication and shall become binding as a contract between the city of Owensboro and the Owensboro Water Works Company on condition that the said water company shall within sixty days from such passage and publication, file with the city Clerk its written acceptance thereof.

Approved Nov. 7th, 92.
[SEAL.] J. H. HICKMAN, *Mayor.*

A copy. Attest:
W. M. O'BRYAN,
City Clerk.

135 **No. 2.**

COUNCIL HALL, November 21st, 1892.

The Council met in regular session with Mayor Hickman and all the members present except Mr. Stirman.

Mr. Stirman came in — took his seat.

The following ordinance was submitted and read whereupon on motion the rules of order were suspended as to voting on ordinances and the same after its second reading was adopted by the following

vote, to-wit: Ayes Mes. Decker, Norton, Smith, Stirman. Noes Mes. Hill, Crauz.

Be it ordained by the Common Council of the city of Owensboro:

Section 1. That the City of Owensboro hereby requests and orders the Owensboro Water Works Company of Owensboro, Ky., to establish a fire hydrant at the intersection of Littles Avenue and Elm Street.

Sec. 2. In consideration of the compliance of said water Company with said request herein set forth, the City of Owensboro hereby rents of said Owensboro Water Works Company the above named fire hydrant for the unexpired term of the franchises of the said Water Company beginning with the date when such hydrant shall be put up and connected with the water works of the Owensboro Water Works Company, and promises to pay therefor the rate of forty ($40) dollars per annum, payable quarterly on the first days of January, April, July and October of each year.

Section 3. This ordinance shall take effect from and after its passage and publication, and shall become binding as a contract between the city of Owensboro and the Owensboro Water Works Company on condition that the said Water Company shall within sixty days from such passage and publication file with the City's Clerk its written acceptance thereof.

Approved Nov. 21, '92.

[SEAL.] J. H. HICKMAN, *Mayor.*

A copy. Attest:
W. M. O'BRYAN,
City Clerk.

136 No. 3.

Ordinance Providing for Extending the Water Mains of the Owensboro Water Works Co. of Owensboro, Ky., and Renting of it One Additional Fire Hydrant.

Be it Ordained by the Mayor and City Council of Owensboro:

Section 1. That the city of Owensboro hereby requests and orders the Owensboro Water Works Company, of Owensboro, Kentucky to lay in the streets of said City of Owensboro a six inch main on Main Street from Plum Street to Orchard Streets.

And the City of Owensboro further requests and requires the said Water Company to put up at the intersection of Main and Orchard Streets a fire hydrant.

The City of Owensboro shall indicate to the Owensboro Water Works Company in due time, the proper curb line at the location of the above designated fire hydrant, if the curbing is not already laid, and shall also indicate to the said Water Company the proper and correct grade of the street in which the main is ordered to be laid as herein specified, if the grade shall not have been definitely made and established at the time the said Water Company shall be ready to commence laying said main.

Section 2. In consideration of the compliance by the Water Company with the requests and requirements of the City of Owensboro as herein set forth, the city of Owensboro hereby rents from the Owensboro Water Works Company the above named fire hydrants for the unexpired term of the franchise of the said water company subject to all the conditions and limitations in the original contract with said company and promises to pay therefor at the rate of forty dollars ($40.) per annum, payable quarterly on the first days of January, April, July and October of each year.

Section 3. This ordinance shall take effect from its passage and publication, and shall become binding as a contract between the city of Owensboro and the Owensboro Water Works Company on condition that the Water Company shall within sixty days from such passage and publication file with the city Clerk its written acceptance thereof.

Approved May 7th, 1894.
[SEAL.] J. H. HICKMAN, *Mayor.*

Attest:
PHIL R. ZULAUF, *Clerk.*

A copy. Attest:
W. M. O'BRYAN,
City Clerk.

137 No. 4.

An Ordinance Providing for Extending the Water Mains of the Owensboro Water Works Company of Owensboro, Ky., and Renting of it Six Additional Fire Hydrants.

Be it ordained by the Common Council of the City of Owensboro:

Section 1. The City of Owensboro hereby requests and required the Owensboro Water Works Company, of Owensboro, Ky. to lay in the streets of said City of Owensboro, the following six inch mains, to-wit:—

On Fifth Street from Breckenridge Street to Leitchfield road;
On Leitchfield road from Fifth Street to Eighth Street;
On Eighth Street from the Leitchfield road to Hall Street;
On Hathaway Street from Seventh Street to Eighth Street.

And the City of Owensboro further requests and requires the said water company to put up at the places hereinafter set forth the following fire hydrants, to-wit:

One at the intersection of Fifth Street and the Leitchfield road;
One at the intersection of Sixth Street and the Leitchfield road;
One at or near the intersection of Seventh Street and the Leitchfield road;
One at the intersection of Eighth Street and the Leitchfield road;
One at the intersection of Eighth Street and Jackson Streets;
One at the intersection of Hathaway and Eighth Streets.

And the City of Owensboro shall indicate to the Owensboro Water

Works Company in due time the proper curb line at the respective locations of all of the above designated six fire hydrants where the curbing is not already laid, and shall also indicate to the said Water Company the proper and correct grade on any and all of the streets on which the mains are ordered to be laid as herein specified, and on which the grades may not have been definitely made and established at the time the said Water Company shall be ready to commence laying the mains on the respective streets.

138 Section 2. In consideration of the compliance by the said Water Company with the said requests and requirements of the city of Owensboro as herein set forth, the city of Owensboro hereby rents of the Owensboro Water Works Company the above named six fire hydrants for the unexpired term of the franchises of the said Water Company, beginning with the date when such hydrants shall be respectively put up and connected with the water works of the Owensboro Water Company, and promises to — therefor at the rate of forty dollars ($40.) each per annum, payable quarterly, on the first days of January, April, July and October of each year. This renting to be subject to the contract exsiting between the city and said company.

Section 3. This ordinance shall take effect from its passage and shall become binding as a contract between the city of Owensboro and the Owensboro Water Works Company on condition that the said Water Company shall within sixty days from such passage file with the city Clerk its written acceptance hereof.

Approved, Oct. 1st, 1894.

J. H. HICKMAN, *Mayor.*

Attest:
PHIL R. ZULAUF, *Cl'k.*

A copy. Attest:
W. M. O'BRYAN,
City Clerk.

139 No. 5.

An Ordinance Amending an Ordinance Entitled "An Ordinance for Extending the Mains of the Owensboro Water Works Company, of Owensboro, Kentucky and Renting of it six additional fire hydrants; passed and approved October 1st, 1894.

Be it ordained by the Common Council of the City of Owensboro:

Section 1. The City of Owensboro hereby requests and requires the Owensboro Water Works Company, of Owensboro, Kentucky, to substitue for the 6" mains specified in the said ordinance passed and approved October 1, 1894, the following 6" mains to be laid in the streets of said city of Owensboro, to-wit:

On *the* Eighth Street from Hall Street to Jackson Street;

On Hathaway Street from Seventh to Eighth Streets;

On Fifth Street from Breckenridge street to the Leitchfield road;
On the Leitchfield road to the point where Sixth street and Jackson Street intersects:
On Jackson Street from Sixth to McFarland Streets;
On McFarland street from Jackson to Oglesby street-.
On Oglesby street from McFarland Street to a point to be designated by the city engineer; it being understood that in designating this point the city engineer shall so designate it that the total amount of pipe to be laid under this ordinance shall not exceed the total amount of pipe called for in the said ordinance passed and approved October 1st, 1894.

The City of Owensboro further requests and requires the said water company to substitute for the list of locations for the six fire hydrants provided for in the said ordinance, passed and approved October 1st, 1894, the following list of locations, to-wit:

One at the intersection of Hathaway and Eighth Streets;
One at the intersection of Fifth Street and the Leitchfield road;
140 One at the intersection of Jackson and Sixth streets;
One at the intersection of Jackson and Seventh street-;
One at the intersection of Jackson and Eighth Streets; and one on Oglesby Street at the end of the intersection to be made on said Oglesby street, as above provided.

Section 2. This ordinance shall take effect from its passage and shall become as a contract between the city of Owensboro and the Owensboro Water Works Company, on condition that the said water company shall within sixty days from such passage file with the City Clerk its written acceptance hereof.

Approved Dec. 17, 1894.

J. H. HICKMAN, *Mayor.*

Attest:
PHIL R. ZULAUF, *Cl'k.*

A copy. Attest:
[SEAL.] W. M. O'BRYAN,
City Clerk.

140½ No. 6.

An Ordinance Providing for Extending the Water Mains of the Owensboro Water Works Company of Owensboro, Ky., and the Renting of said Company of Three Fire Hydrants.

Be it ordained by the common Council of the City of Owensboro:

Sec. 1. That the City of Owensboro hereby requests and directs the Owensboro Water Works Company of Owensboro, Ky., to lay in the streets of the City of Owensboro, Ky., a six inch main along Maryland Street from Triplett Street to Sweeney Street, approximately 440 feet, and along Maryland Street from Sweeney Street to Mosley Street, approximately 445 feet, and from end of pipe on

McFarland Street at Smith's corner to the curbing on the east side of Center Street along McFarland Street, approximately 290 feet; and it also requests and requires said water Company to put up three additional fire hydrants of the kind and quality contemplated by the contracts between the City of Owensboro and said Company, and the most modern kind now in use in said city by said company, and at the following points; one at the intersection of McFarland Street with Center Street; one at the intersection of Maryland Street with Sweeney Street, and one at the intersection of Maryland Street with Moseley Street.

The City of Owensboro will indicate to the Owensboro Water Works Company, in due time, the exact location of the above designated fire hydrants the proper curbing line at the location of same, if the curbing is not already laid, and it will also indicate to the Water Works Company the proper and correct grade on the streets in which the mains are laid as herein specified, if the grades shall not have been definitely made and established at the time the said Water Company shall be ready to lay said mains.

In consideration of the compliance of said Water Company with the said requests and requirements of the city of Owensboro as herein set forth, the City of Owensboro hereby rents of the Owensboro Water Works Company the above named three fire hydrants
141 for the unexpired term of the franchise and contract of the said Water Works Company, beginning with the date when such hydrants shall be put up and connected with the Water Works of the Owensboro Water Works Company, and put in condition to be used by the fire department of said City, the said renting to be on the terms and conditions provided and stipulated in the contract now existing between said city and said company. And the said city promises to pay therefor at the rate of $40 per annum, payable quarterly, on the first days of January, April, July and October of each year.

No. 3. This ordinance shall take effect and be in force from and after its passage, and shall become binding as a contract between the city of Owensboro and the Owensboro Water Works Company on condition that the said company shall within 60 days of passage hereof file with the City Clerk its written acceptance of this ordinance.

Approved Sept. 16, 1895.

J. H. HICKMAN, *Mayor.*

Attest:
PHIL R. ZULAUF, *Clerk.*

A copy. Attest:
[SEAL.]

W. M. O'BRYAN,
City Clerk.

142 & 143 No. 7.

An Ordinance Requiring the Owensboro Water Works Company to Put Down a Water Main or Pipe on St. Ann Street from Fifth Street — Main to Seventh Street.

Be it ordained by the common Council of the City of Owensboro:

Sec. 1. That the Owensboro Water Works Company be and it is ordered to remove the one inch pipe and the three-quarter inch pipe in St. Snn Street between Fifth and Seventh Streets the same being insufficient for supplying water for the people living on said St. Ann Street, and that said company instead thereof lay down in said street from Fifth to Seventh Streets a water main of six (6) inches in diameter and make all proper and necessary connections with houses of all who may desire water furnished for domestic use, said six inch main shall be put down by said Company within the ten (10) days next ensuing, and shall be put down at such places in said street as may be designated by the City Engineer and under his supervision.

Sec. 2. That said Water Works Company be and it is hereby directed to put in a fire hydrant at the south east corner of Cherry and Maple Streets.

Sec. 3. This ordinance shall go into full force and effect on its final passage.

Approved July 25th, 1900.

W. P. SMALL, *Mayor.*

Attest:
W. M. O'BRYAN,
City Clerk.

A copy. Attest:
[SEAL.]

W. M. O'BRYAN,
City Clerk.

144 No. 8.

An Ordinance Amending an Ordinance Entitled "An Ordinance Providing for Extending the Water Mains of the Owensboro Water Works Company, of Owensboro, Kentucky, and the Renting of said Company of Three Fire Hydrants," Passed and Approved September 16th, 1895.

Be it ordained by the Common Council of the City of Owensboro.

Section 1. That an ordinance passed September 16th, 1895, and of record in special ordinance book No. 1, page 64, entitled an Ordinance providing for extending the water mains of the Owensboro Water Works Company, Owensboro Kentucky, and the renting of said Company of three fire hydrants," be, and the same is, *is* hereby amended by requiring of said Water Works Company that it lay an 8 inch water main in along Maryland Street from Triplett Street to Moseley Street instead of a 6 inch water main.

Section 2. This ordinance shall take effect and be in force from

and after its passage, and shall become binding as a contract between the City of Owensboro and the Owensboro Water Works Company on condition that the said Water Works Company shall within sixty days of the passage thereof file with the City Clerk its written acceptance of this ordinance.

Approved Jany. 6th, 1896.

J. H. HICKMAN, *Mayor.*

Attest:
PHIL R. ZULAUF, *Cl'k.*

A copy. Attest:
[SEAL.] W. M. O'BRYAN,
City Clerk.

145 UNITED STATES OF AMERICA,
Western District of Kentucky, ss:

I, A. G. Ronald, Clerk of the District Court of the United States for said Western District of Kentucky, do hereby certify the above and foregoing to be a true and complete copy of the Amended Bill in Equity, filed in said court, on the 26th day of October, A. D. 1903, in the cause wherein Owensboro Water Works Company the Complainant and City of Owensboro the Defendant, as the same appears from the original now remaining in my custody and control.

In Testimony whereof, I have hereunto set my hand and affixed the seal of said court, this 11th day of Nov., A. D. 1914.

[SEAL.] A. G. RONALD, *Clerk.*
By M. E. DUNN, *D. C.*

146 EXHIBIT "K", FILED WITH THE ANSWER OF DEFENDANT, CITY OF OWENSBORO.

Filed November 21st, 1914.

Daviess Circuit Court.

THE OWENSBORO WATER WORKS COMPANY OF OWENSBORO, KENTUCKY, and the Owensboro Water Works Company, of Owensboro, Ky., Assignee of the American Loan & Trust Co., Plaintiffs,
vs.
THE CITY OF OWENSBORO, Defendant.

Petition.

The plaintiffs, the Owensboro Water Works Company of Owensboro, Kentucky, and the Owensboro Water Works Company, of Owensboro, Ky., assignee of the American Loan & Trust Company, state that the plaintiff, the Owensboro Water Works Company, of Owensboro, Ky., is a corporation duly created, organized, existing and doing business by and under the laws of the State of Kentucky,

under and by authority of its articles of incorporation duly executed and filed in the Clerk's office of the Daviess County Court, on the 3rd, day of June, 1889, and under and by which it was authorized and empowered to contract and be contracted with, sue and be sued, and authorized and empowered to acquire the Water Works of the Owensboro Water Co., a corporation organized and existing under the laws of the State of Kentucky, and its contracts for supplying the City of Owensboro, and its inhabitants, with water, and to maintain and operate water works in the city of Owensboro, and the County of Daviess, and the State of Kentucky, for supplying the said City with water for public and private purposes, and to
147 commence business on the 1st day of June, 1889, and to continue for a period of 25 years thereafter.

That the defendant city of Owensboro is a minicipal corporation created, organized and existing by, and under the laws of the State of Kentucky, and was originally created a city by an act of the General Assembly of the Commonwealth of Kentucky, entitled, "An Act to incorporate the City of Owensboro, in Daviess County," which act was approved and became a law on February 16, 1866, and it was continued a minicipal corporation by an act of the General Assembly of the Commonwealth of Kentucky, entitled, "An Act to reduce into one all of the acts relating to the City of Owensboro," which act was approved and became a law on the 6th day of March, 1876, and it was further continued as a minicipal corporation by an act of the General Assembly of the Commonwealth of Kentucky, entitled, "An Act creating a new charter for the City of Owensboro" which was approved and became a law on March 18, 1882, and it was further continued as a minicipal corporation by an act of the General Assembly of the Commonwealth of Kentucky, entitled "An Act for the government of cities of the third class," which act was approved and became a law on June 14, 1893, and since said date the said defendant has existed as a corporation by virtue of the last named act.

By said Acts of February 16, 1866, and of March 6, 1876, the Common Council of the defendant city has conferred upon and vested in it full power to make, establish and regulate public wells, cisterns, reservoir and pumps and to provide for the furnishing of said city, and inhabitants thereof, with water, and to prevent and guard against damage by fire, and to provide, by contract, for the construction, maintenance and operation of the system of water works, in said city, for said purposes, and to grant to others the privilege of laying pipes, mains and conduits in and through the streets of said city, and to attach fire hydrants there*for*, and to supply the said city water for fire protection, and other public uses. All of said powers were
147*a* continued, remained and vested in said city by and under the said acts of incorporation of March, 18, 1882.

That by articles of incorporation duly executed and admitted to record in the office of the Clerk of the Daviess County Court, there was created, on the 9th day of September, 1878, a corporation entitled, "Owensboro Water Company"; that by virtue of said articles of Incorporation, and under the laws of the State of Kentucky, then in force, the said corporation had conferred upon, and vested in it

power to contract and be contracted with, to sue and be sued in said corporate name, and to build, construct and operate in City of Owensboro, a system of water works for a supply of water in said city, and inhabitants thereof, for both public and private purposes, and to have granted to, and conferred upon it, by said city, the privilege and franchise to lay its water pipes, conduits, and other necessary appliances in the streets and public alleys, and public places in said city, and *to* privilege to furnish said city, and the inhabitants thereof, with water for public and private purposes, and to sell, dispose of, and transfer all property, or franchise, which it might pos-ess, or require, under such streets from said city, or otherwise. The corporate existence of said Company was, by said articles of incorporation, fixed at a period of 25 years from and after said 9th day of September, 1878.

That on the 10th day of September 1878 the defendant made and entered into a contract with the said Owensboro Water Co., whereby and wherein on certain terms and conditions therein specified it granted to the said *of* Owensboro Water Company, and to its successors and assigns, for the duration of said company, franchise and privileges to construct and operate, in the City of Owensboro, water works for the supply of said city, and the inhabitants thereof,
148 with water from the Ohio River, for public and private purposes, and to use the streets, alleys and other public highways within the then present and future limits of said city, for the purpose of laying and preparing pipes, conduits, hydrants and fountains for the supply of water. It was further provided, in said contract, that in consideration of the benefits which would be derived by said city and its inhabitants by the con*d*struction and operation of said water works, and in consideration of the ris*t* of so large an investment by said Company, in said city, and the rights and privileges and franchises thereby granted to and vested in said Company, should remain in force and effect for 25 years from the passage of the ordinance embracing said contract; and defendant, by said contract, did then rent, from said Company, for fire protection, one fire hydrant at each intersection of the streets along the lines of pipe required to be *p*aid in said contract, amounting then to 62 hydrants for and during the term of 25 years, from the date of said contract, and agreed to pay for the first fifty hydrants at the rate of *of* $75. each per year, and for all hydrants in excess of the first fifty at the rate of $50 each per year beginning as soon as the said water works company should be put in successful operation, which sums of money the defendant agreed to pay to said company quarterly on the first days of January, July, April and October of each and every year during the existence of said contract; and it was further provided in said contract that if any extension or extensions of pipes should be made by said company during the said term of twenty-five years, at the instance or request of the defendant city, then the said defendant thereby agreed and bound itself to take, on the line and lines of such extensions, one hydrant as soon as completed at each intersection of the streets along the whole length of such ex-
149 tension or extensions, and to pay therefor the unexpired term of said franchise at the rate of $50 each per year, payable

quarter-yearly, at the same *times* above stated in said contract as to the first 62 hydrants. The said contract was embraced in a certain ordinance and the acceptance thereof. The said ordinance is entitled "An ordinance authorizing the said construction and operation of water works in the city of Owensboro, and granting certain franchises and contracts to the Owensboro Water Company." It was also provided in said ordinance as follows: "This ordinance shall become binding upon the city of Owensboro as a contract in the event that the said Owensboro Water Company *wherein* ten days after its passage shall file with the mayor of said city its written acceptance of the conditions of this ordinance, and after such acceptance this ordinance shall be the measure of the rights and liabilities of the said city and of the water company," and on the same day that the said ordinance was adopted and approved, to-wit: on the 10th day of September, 1878, the said Owensboro Water Company delivered to the mayor of the city of Owensboro and the said mayor presented to the common council of the said city, and the said Mayor and common council approved, the written acceptance of the provisions of said ordinance as therein provided, which written acceptance is in the possession of defendant and was in words and figures as follows, to-wit:

"OWENSBORO, KY., Sept. 10, 1878.

"Please take notice that the Owensboro Water Company accepts the conditions of an ordinance of the City of Owensboro, entitled "An ordinance authorizing the construction and operation of waterworks in the city of Owensboro, and granting certain franchises and contracts to the Owensboro Water Company," passed on the 10th day of September, 1878.

Very respectfully,

OWENSBORO WATER COMPANY,
By DENNIE LONG, *President.*"

150 By said ordinance, which constituted the contract between the said Owensboro Water Company and the defendant, City of Owensboro, it was prescribed as to the kind of water works plant and the method of construction as to sizes of pipes, as to capacity and as to the construction of pumping apparatus and kinds of hydrants, and by accepting the terms of said contract as embraced in said ordinance, the said Owensboro Water Company covenanted, agreed and undertook, and became firmly bound, to construct and operate in the City of Owensboro water works for the supply of said city and the inhabitants thereof with water from the Ohio River for public and private purposes and to lay its pipes in the streets and alleys and other public highways within the then limits of said city, or the future limits thereof, and to construct its hydrants for the supply of water, and to make, provide and equip such other necessary attachments as were necessary and proper in supplying water for private purposes to the inhabitants of said City. And, by and under the authority conferred upon it in said contract, and invested in it by and under its charter and the laws of the State of Kentucky, and in the exercise of the franchises and privileges thus vested in it, it did at once pro-

ceed to construct its pumping house, to lay its pipes, to attach its hydrants and to make all necessary provisions for supplying water to the city of Owensboro for public purposes, and to the inhabitants thereof for private purposes, and on November 15th, 1878, said Mayor and Council passed an ordinance by which it requested and directed said Owensboro Water Works Company to extend its pipe system in said streets, as therein specified, and to put up, on said lines of extension, ten hydrants in addition to those mentioned in said ordinance of September 10, 1878, and in said ordinance contracted and agreed to pay said company, the sum of fifty dollars, each, per year, payable as stipulated in said original ordinance.

Plaintiffs further state that said company, in the construction and equipment of its said plant did duly and fully, in all re-
151 spects, carry out each and every stipulation contained in said ordinances, and agreed to be done and performed by it, and did duly construct said plant, in all respects as required by said ordinances, and did furnish water, for both public and private uses, to said city and its inhabitants, as it had therein agreed and covenanted to do, until June 3, 1889.

Plaintiff- further states that on August 19, 1879, the Mayor and council of said city held a meeting and at said meeting *and* approved and accepted the said water works plant, so constructed by said Owensboro Water Company, and said approval and acceptance was reduced to writing and spread upon the minute book of said council now in possession of defendant, and is in words and figures as follows, to-wit:

"Whereas, by ordinance heretofore enacted by the City of Owensboro, Ky., contracts were made between the city of Owensboro and the Owensboro Water Company for the supply of water, as in said ordinance recited; and, Whereas the said Owensboro Water Company has erected water works conforming to the requirements of said ordinance, and:

Whereas a test of said water works under the supervision of a committee appointed by the city council has proved the said water works to be of the power and capacity required by the said ordinances; therefore be it Resolved by the Mayor and City Council of Owensboro that the said water works of the Owensboro water company be and the same are hereby accepted by the City of Owensboro, so far as it may be necessary that the same should be accepted for the further execution of the said contracts, between the city of Owensboro and the Owensboro Water Company."

Plaintiff- files herewith, as part hereof, as exhibits, copies of said ordinance of September 10, 1878, marked "No. 1" and said ordinance of Nov. 15, 1878, marked "No. 2."

152 Plaintiffs further state that said Owensboro Water Co., operated its said water works according to the terms and conditions in said contract set out, but that prior to July 15, 1884, certain disputes arose between it and the defendant city of Owensboro as to whether it was of the kind and capacity and efficiency stipulated in said contract, and certain litigation was instituted and pending between the said defendant and the said Owensboro Water

Company, when during the pendency of said litigation, and on July 15, 1884, the said city of Owensboro duly enacted, and the Mayor of said city approved, an ordinance providing for the terms of a settlement beween the city of Owensboro and the Owensboro Water Company of the litigation then pending between them. In the preamble to said ordinance it was recited in substance that both the city of Owensboro and the Owensboro Water Company were desirous of settling their respective claims and litigations, that the City of Owensboro had doubted that the power and capacity of the works of the Owensboro Water Company came up to the requirements of the contract made September 10, 1878, and that the water company claimed that its said works had the power and capacity required by its contract and was willing to demonstrate this by public test, therefore, for the purpose of ascertaining the truth, regarding such disputed points and for the purpose of settling the said claims and litigations, it was ordained by the common council of the defendant city that F. J. Birk and J. P. Troutman, be and they were, irrevocably appointed by the city of Owensboro, in conjunction with two other persons to be appointed by the Owensboro Water Company, they to select a fifth person, and the said five persons, or their majority, were authorized and instructed for and in behalf of the city of Owensboro to superintend a public test to be made by the Owensboro Water Co., of its water works in the month of August, 1884, and as arbitrators to return to *return to* said parties their answer to the questions of dispute therein specified; and
153 it was further provided that the said finding of the said five persons, or their majority, should be final and conclusive on the part of the City of Owensboro, regarding the facts of the questions so submitted to them. And it was further provided that in the event the said finding should be that the said water works had the power and capacity by it claimed then the claims and litigations of the City of Owensboro and the Owensboro Water Company should be at once settled upon the terms and condition in said ordinance specified; and among the matters and things therein stipulated to be settled was the provision that the City of Owensboro should relinquish the right to require the Owensboro Water Company to erect a stand-pipe, which it was bound to do if so required by the original contract. It was further stipulated in said ordinance that in case the said company should be thus found to have constructed water works of the capacity and up to the requirements contained in the original contract *there,* the claims and litigation of the defendant, and said company should be at once settled upon the basis that all suits should be dismissed settled, and said company should relinquish all claims against defendant for hydrant rentals up to and including the date of the said test, and that said company should thenceforth, except in case of unavoidable accidents, keep constantly, day and night, all fire hydrants supplied with water for fire services, and when the fire alarm should be given, to turn on fire pressure with due diligence. That the said company should make no charge for water to be taken by defendant from hydrants for filling its fire cisterns, and defendant

should relinquish all claims against said company, and its property, on account of said taxes, including the taxes of the year 1884. That all fire hydrants should be in charge, and under the control of the chief of the fire department, or in his absence, in the control of the officer in charge of the said department, and that said hydrants should be inspected by defendant, from time to time,
154 as it might seem necessary, and, if on such inspection any of said hydrants be found out of working order, the officer, in charge thereof, should forthwith notify the said company, in writing, specifying the hydrants out of working order, and thereupon the said Company should place such hydrants in working order with reasonable dispatch, and that such officer should also report to the council the date of such examination, and the result thereof, and his subsequent action, if any; and in case any of said hydrants should remain out of repair for one week, or more, after said company had been notified thereof, in writing, then no rent should be payable for such hydrants for the period said hydrants should not be in working order after such notice; and defendant agreed to use the hydrants carefully, and to reimburse said company *if* any injury which might happen to them when used by any officer or servant of defendant, or any member of its fire department. That said company should place upon its existing mains ten additional fire hydrants, at places specified in said ordinance, but that the defendant had the right, before the said hydrants should be so placed, to select their location for them upon the then existing mains. That the defendant should pay to said company, for the use of said additional hydrants, in accordance with the provisions of said ordinance of September 10, 1878, $50 each per annum, beginning as soon as the said hydrants should be put up, connected and continuing for the unexpired term of twenty-five years, provided in said ordinance of September 10, 1878, and payable in quarter yearly installments on the first days of January, April, July, and October of *year* year, and every year during said term. That defendant should also locate on or before the first day of July, 1885, and rent of said company for said unexpired term of 25 years, five additional fire hydrants, at the rate of $50. each per annum, beginning as soon as said hydrants should be put up and connected,
155 payable in quarterly installments as aforesaid. That if said five additional hydrants should necessitate extension of pipe, by the said company, the erections should be so made, by the defendant, as to require extension, not exceeding in the aggregate, the length of five ordinary squares in the city.

It was also expressly provided that in other respects than those in said ordinance expressly named the rights and duties of the Owensboro Water Co., should remain as defined in the water-works ordinances theretofore adopted concerning it, which to that extent were confirmed and ratified, and that the said ordinance should becom binding upon the City of Owensboro, as a contract in the event that the Owensboro Water Company should within ten days from the passage of said ordinance, file with the City Clerk its written acceptance thereof. A duly certified copy of said preamble

and ordinance is filed herewith and made part hereof, marked Exhibit #3.

Plaintiffs further state that thereafter on the 23rd day of July, 1884, the said water works company did file with the clerk of said city the following acceptance of said ordinance;

"To the common council of the city of Owensboro.

"GENTLEMEN: Please take notice, that the Owensboro Water Company of Owensboro, Ky., hereby accepts the ordinance of the city of Owensboro passed by the common council of said city on the 15th of July, in the year 1884, entitled "An ordinance providing the terms *the terms* of a settlement between the City of Owensboro and the Owensboro Water Company of the litigation now pending between them."

Which written acceptance, so filed with the said clerk, was duly signed by the Owensboro Water Company by its president Dennis Long, and the same was received and accepted by the said city Clerk for and on behalf of the City of Owensboro, and is now in
156 the possession of defendants.

Plaintiffs state that pursuant to said contract the said Owensboro Water Company selected two other persons, and they, together with two persons selected by the common council of the city of Owensboro selected a fifth person, and these five persons on August 22nd, 1884, made to the common council of the city of Owensboro its report of the Public test made by said water company as provided in said ordinance. The said report so made was as follows:

"To the City of Owensboro, Kentucky:

"We, the committee appointed to decide as to the power and capacity of the Owensboro Water Company to comply with the series of tests embraced in section first of an ordinance in regard to the City of Owensboro and the Owensboro Water Company, have to report that the said Owensboro Water Company has fully shown its power and capacity to fulfill all the tests so embraced in said section of said ordinance, and that said water company has fully stood the test as stipulated in said section of said ordinance. And we hereby return to the parties this our award and finding.

Very respectfully,
(Signed)

M. V. MONARCH.
F. J. BIRK.
J. P. TROUTMAN.
WM. CAYE.
EDW. HUGHES."

And on the 25th day of August, 1884, the said award was presented to the said city council and was by it duly accepted, approved and concurred in, and it is now in the possession of defendants.

Plaintiffs further state that on November 3, 1884, the mayor and council of defendant duly enacted, and the mayor of said city approved, an ordinance in and by which defendant requested and ordered said company to extend its pipe system by laying cer-
157 tain mains therein mentioned, and to put up 17 fire hydrants of the quality as required by the ordinance of September 10, 1878, at certain places mentioned therein, said hydrants being numbered No. 78 to No. 93 inclusive, and that defendant thereby rented of said company, for the uses stated in said ordinance of September 10, 1878, said 17 fire hydrants for and during the unexpired term of 25 years, provided in said ordinance, and agreed to pay said company, at the rate of $50. each per annum, beginning as soon as each of them should be put up, and connected, and made said payments in quarter yearly installments on the first days of January, April, July and October, of each and every year. And that the said ordinances should become binding as a contract as soon as said Company should accept its terms and conditions in writing, by filing such acceptances with the clerk of said city. That the said locations of additional hydrants supersede those made in the said ordinance of July 15, 1884, and thereafter on the 15th day of November, 1884, said Company filed with the clerk of defendant city its written acceptance of said ordinance, which written acceptance is in the possession of defendant. Plaintiff- files herewith and as part hereof, a copy of said ordinance, marked Exhibit #4.

Plaintiff- further states that said company, in the construction and equipment of its plant did duly and fully, in all respects, carry out each and every stipulation contained in said ordinance, and agreed to be done and performed by it, and did duly construct said plant, in all respects as required by said ordinance, and did furnish water for both public and private uses, to said city and its inhabitants as it had therein agreed and covenanted to do, until June 3, 1889.

Plaintiffs further state that by an ordinance duly passed, by the mayor and council of defendant city, and approved by the mayor thereof, on December 20, 1887, the defendant city
158 amended said ordinance of September 10, 1878, November 15, 1878, and July 15, 1884, and therein and thereby requested and ordered the said Owensboro Water Company, to extend its pipe system by laying certain mains in said city therein mentioned, and to place thereon additional hydrants, at places therein specified, 32 additional hydrants numbered No. 94 to No. 125, inclusive, which defendant rented of said company for the uses stated in said ordinance of September 10, 1878. It was further stipulated and provided in said ordinance that defendant should take and pay for said 32 hydrants, in addition to the 93 hydrants, (which the said ordinance recited were then in use) as follows, to-wit: For said 93 hydrants, and for the next seven hydrants, $50. each per annum, and for the next 25 hydrants $40. each per annum; for the remainder of the term of the contract, then existing, and to begin on January 1, 1888, and further provided that the rental of

all subsequent hydrants which may be erected and placed by said company at the instance of defendant, should be, and was definitely fixed at $40 each per annum, instead of $50 as heretofore provided, and the rentals were reduced to said sums respectively, and were to be paid on quarterly installments upon the same dates as heretofore provided in said previous ordinances. It was further provided that said company should accept, and the defendant should pay to it, the sum of $1,437. in full payment and satisfaction of all rentals from July 1, 1887, to January 1, 1888. It was further provided that said ordinance was passed upon the express condition that said company should, with reasonable dispatch lay said additional mains, and erect said additional hydrants, and erect an additional pumping engine in capacity not less than either of the two pumping engines then in use by said company; that said additional pumping engine should have a separate and distinct suction pipe into the river, and that said company should cause its works, within a reasonable time, weather permitting, to be placed in condition to fully comply with all the requirements of said ordinance of Sep-

159 tember 10, 1878, November 15, 1878, and July 15, 1884, both as to said hydrants theretofore in use, and those thereby contracted for, and keep said works in condition and ready for use at all times, until the termination of the original contract; that the rentals therein provided should be abated at the rate of $100. per month from and after January 1, 1888, until said additional pump should be made, and placed in position, and until said additional mains should be laid, and said works placed in condition to comply with the test provided for in the original ordinance; and further provided that in all other respects the rights and duties of the defendant, and said company, should remain unaltered, and that said ordinance should become binding as a contract with said city, in the event that said company should file its written acceptance thereof, with the city clerk, within ten days from its passage. A copy of said ordinance is filed herewith, as part hereof, marked Exhibit #5.

Plaintiffs further state that on January 2, 1888, said company filed with the Clerk of said city, its written acceptance of said ordinance, and said acceptance is now in the possession of the defendant, the same having been duly signed by said company, by its President, Dennis Long, and the same was received and accepted by the city clerk for and on behalf of defendant.

Plaintiffs further state that said Company, in the construction and equipment — its plant specified in said ordinance, did fully and in all respects carry out each and every stipulation contained in said ordinances, and agreed to be done and performed by it, and did fully construct same in all respects as required by said ordinance, and particularly did duly construct said additional pump, and said additional mains prior to the year 1891, and did furnish water, for both public and private uses to said city and its inhabitants, as it had therein agreed and covenanted to do until June 3, 1889.

160 Plaintiffs further state that the said Owensboro Water Company continued to maintain and operate its said water

works in said city and to furnish to the said city and the inhabitants thereof water for public and private purposes, and it did in every manner and all respects keep and perform the conditions, undertakings and covenants in its said contract until June 3, 1889.

Plaintiffs further state that from the time its original contract was made until the said 3rd, of June, 1889, the said City of Owensboro had greatly increased in population and its territory had been so extended as to include large areas not theretofore embraced therein, and that the capital stock of the said Owensboro Water Company, and the limitations upon its right to become indebted were such that it became evident that more capital would be required to supply the rapidly growing city and the inhabitants thereof with water, and there having been duly organized and created a corporation, the plaintiffs herein, as hereinbefore set out, with a capital stock of $300,000 and an authorized capital of $500,000 and an authorized indebtedness of two-thirds thereof, and it then being the desire of the Owensboro Water Company and of the Owensboro Water Works Company that the said Owensboro Water Company should sell and the Owensboro Water Works Company should purchase all the property, rights, privileges, franchises and contracts then owned by the said Owensboro Water Company, and the said Owensboro Water Works Company having a much larger capital and being better able to supply the said City of Owensboro and the inhabitants thereof with water, both for private and public purposes, and it being then necessary that large extensions and improvements should be made in said water works in said city for said purposes, and it being much desired by and greatly to the advantage and benefit of said city and its inhabitants that said sale and transfer should be made, the common council of defendant City of Owensboro did, on June 3rd,
161 1889, duly pass and adopt, and the mayor approved, an ordinance which is in the words and figures as follows, to-wit:

162 COUNCIL HALL, MONDAY, June 3rd, 1889.

"The following ordinance was submitted and read, whereupon on motion the rules of order were suspended as to voting on ordinances and the same, after its second reading, was enacted by the following vote, to-wit: Ayes, Messrs. Baer, Vargason, Higdon, Cullen, Decker. Noes, None.

"Whereas the Owensboro Water Works Company, of Owensboro, Kentucky, a corporation duly organized and existing under the laws of the State of Kentucky is ready to purchase the water works of the Owensboro Water Company, together with its existing contracts for supplying the City of Owensboro and the inhabitants of said city and its vicinity with water, and whereas, it is desired by the said two companies in order that the said purchase may be consummated, that the City of Owensboro grant to the said The Owensboro Water Works Company, of Owensboro, Kentucky, the franchises and license to maintain, complete and operate water works in the city of Owensboro and to use the streets, alleys and other public highways within the said city for laying, repairing and taking up mains, service pipes, hydrants and other apparatus for the supply of water,

and that the City of Owensboro accept the said The Owensboro Water Works Company, of Owensboro, Kentucky, as the successor to the contracts made by the City of Owensboro, with the Owensboro Water Company for hydrant rentals; now in order to enable the said companies to carry out their negotiations, and to vest the contracts of the Owensboro Water Company for hydrants as fully in the said The Owensboro Water Works Company, of Owensboro, Kentucky, as if they had been originally made by the City of Owensboro with the said The Owensboro Water Works Company, of Owensboro Kentucky.

163 Be it ordained by the Common Council of the City of Owensboro:

"Sec. 1. That in consideration of the purchase by the Owensboro Water Work Company, of Owensboro, Kentucky, of the water works of the Owensboro Water Company, the franchise and license are hereby granted to the Owensboro Water Works Company, of Owensboro, Kentucky, and to its successors and assigns, for and during the existence of the said corporation, to maintain, complete and operate water works in the city of Owensboro for supplying the city of Owensboro and the inhabitants of said city and its vicinity with water for public and private purposes, and to use within the present and future limits of the city of Owensboro, the streets, alleys and other public highways thereof for the purpose of laying, repairing and taking up mains, service pipes, hydrants, and other apparatus for the supply of water.

"But there shall be no continued unreasonable obstruction of the said streets, alleys and other public highways, and after their use from time to time, they shall be restored by the said water works company as near as practicable to their former condition; and the said grant is subject to the existing right of purchase of the said water works by the said City of Owensboro.

Sec. 2. That, in like consideration of the said purchase, by the Owensboro Water Works Company, of Owensboro, Kentucky, of the water works of the Owensboro Water Company, the City of Owensboro Kentucky as the successor to the contract for hydrant rental now existing between the City of Owensboro and the Owensboro Water Company as fully as if such existing contracts had been originally made by the City of Owensboro with the said The Owensboro Water Works Company of Owensboro, Kentucky, without the intervention of the said Owensboro Water Company.

164 "Sec. 3. That the consent of the City of Owensboro is hereby given to the consummation of the said purchase of the said water works of the Owensboro Water Company by the Owensboro Water Works Company of Owensboro, Kentucky, and upon such consummation the mayor and city clerk of the city of Owensboro are hereby authorized and instructed to seal duplicate copies of the ordinance with the seal of the City of Owensboro, and to sign such copies as a contract between the City of Owensboro and the Owensboro Water Works Company, of Owensboro, Kentucky, and to deliver one of such copies so signed and sealed to the Owensboro

Water Works Company of Owensboro and to accept the other in behalf of the City of Owensboro, when signed and sealed by the said The Owensboro Water Works Company of Owensboro, Kentucky.

Sec. 4. This ordinance shall take effect at its passage and publication.

JOE LEE, *Mayor.*

PHIL R. ZULAUF, *Clerk.*"

A certified copy of said ordinance is filed herewith and made a part hereof, marked Exhibit #6.

Plaintiffs further state that from said ordinance it appears and the truth is, that the said City of Owensboro, at the request of the said Owensboro Water Company and of the said Owensboro Water Works Company did consent to the sale and transfer of the property, rights, privileges, franchises and contracts of the Owensboro Water Company to the Owensboro Water Works Company, and did by said ordinance fully authorize, approve and ratify said sale and transfer. Moreover, by the said ordinance and the preamble thereto hereinbefore fully set out, it, the said City of Owens-
165 boro, did grant to the Owensboro Water Works Company the franchise and license to maintain, complete and operate water works in the city of Owensboro, and to use the streets, alleys and other public highways, with said city for laying, repairing and taking up mains, service pipes, hydrants and other apparatus for the supply of water, and the said city of Owensboro did thereby accept the said Owensboro Water Works Company as the successor to the contract made by the City of Owensboro with the Owensboro Water Company for hydrant rentals; and as an inducement to your plaintiff, The Owensboro Water Works Company, to so purchase the property and rights, privileges, franchises and contract of the Owensboro Water Company, the said City of Owensboro by its said ordainance did specifically provide that in consideration of the purchase of the Owensboro Water Works Company, of Owensboro, Ky., of the water works of the Owensboro Water Company, "the franchise and license are hereby granted to the Owensboro Water Works Company, of Owensboro, Ky., and to its successors and assigns for and during the existence of the said corporation to maintain, complete and operate water works in the city of Owensboro for supplying the city of Owensboro and the inhabitants of said city and of its vicinity with water for public and private purposes and to use within the present and future limits of the city of Owensboro the streets, alleys and other public highways thereof for the purpose of laying, repairing and taking up mains, service pipes, hydrants and other apparatus for the suppply of water." And the grant of the rights, franchise and privileges aforesaid were then made directly to the said Owensboro Water Works Compay, and were in addition to the rights, franchises and privileges which it acquired by its purchase of the rights, franchises and privileges of the Owensboro Water Company, and extended during the whole period of its corporate existence, a period of twenty-five years from

and after the 1st of June, 1889. And, by the said ordinance
166 the said City of Owensboro in like consideration of the said purchase by plaintiffs, the Owensboro Water Works Company, accepted the said Owensboro Water Works Company as the successor to the contract for hydrant rental then existing between the City of Owensboro and the Owensboro Water Company as fully as if such existing contract had been made by the said City of Owensboro and the Owensboro Water Works Company on the said 3rd day of June, 1889, for a period of twenty-five years and as fully as though they had been made with said company without the intervention of the said Owensboro Water Company, and by the said ordinance it was further provided that the consent of the City of Owensboro was thereby and therein given to the consummation of the said purchase of the said water works of the Owensboro Water Company by the Owensboro Water Works Company, and upon such consummation the mayor and city clerk of the city of Owensboro were duly authorized and instructed to seal duplicate copies of the said ordinance with the seal of the City of Owensboro, and to sign such copies as a contract between the City of Owensboro and the Owensboro Water Works Company, and to receive the other copy in behalf of the city of Owensboro when signed and sealed by the Owensboro Water Works Company. The said ordinance went into effect on the day of its passage, and thereupon the said Owensboro Water Company did sell to, and the said Owensboro Water Works Company did purchase of it, all of its rights, titles, privileges and franchises and the same was duly conveyed and transferred to it by deed from the said Owensboro Water Company dated June 10, 1889, which deed was duly acknowledged and delivered and recorded in the office of the clerk of the Daviess County Court. A duly certified copy thereof is filed herewith and made a part hereof marked Exhibit #7.

The Mayor and Clerk of said City did duly sign and seal copies of said ordinance and deliver the same to plaintiff, The Owensboro Water Works Company, which signed, sealed and delivered one copy thereof to the said City of Owensboro, which it received and accepted.

167 Plaintiffs state that by the contract embraced in the said ordinance of June 3rd, 1889, as well as the contracts aforesaid existing by and between the City of Owensboro and the Owensboro Water Company, all of which were transferred to and vested in plaintiffs, The Owensboro Water Works Company, by and with the consent, and by the procurement of the said City of Owensboro, there was created and now exists between plaintiff, The Owensboro Water Works Company, and the said defendant, City of Owensboro, a valid and binding contract whereby and wherein plaintiffs, the said Owensboro Water Works Company has acquired and now has conferred upon and vested in it the sole and exclusive right, franchise and privilege during the period of twenty-five years from and after June 1, 1889, to maintain, complete and operate water works in the city of Owensboro for supplying the City of Owensboro, and the inhabitants of said city and its vicinity, with water for

public and private purposes from whatsoever source said water may be taken and supplied and to use within the present and future limits of said city exclusively and solely the streets, alleys and other public highways for the purpose of laying and repairing and taking up mains, service pipes, hydrants, and other apparatus for the supply of water; and it has the like sole and exclusive right and privilege to furnish all of the inhabitants of said city water for domestic purposes, and the city of Owensboro water through its hydrants for extinguishing fires, and for other public purposes, and that the City of Owensboro is bound by its said contract to pay to plaintiff for said hydrants during the said period of twenty-five years from and after June 1st, 1889, the hydrant rentals therein specifically named, $50. per annum each for the first one hundred hydrants and $40. per annum each for the remaining hydrants.

Plaintiffs further state that since the 3rd, day of June, 1889, it has completed, maintained and operated at all times a system
168 of water works in the city of Owensboro of that kind, capacity and efficiency stipulated in its contract and said ordinance as hereinbefore set out, and has at all times, unavoidable accidents excepted, furnished to the inhabitants of said city, and to the said city, water for domestic purposes.

Plaintiffs further state that on October 6, 1890, the mayor and council of defendant city duly enacted and the mayor of said city approved an ordinance in and by which it requested and ordered this plaintiff, the Owensboro Water Works Co., to extend its pipe system by laying certain mains therein mentioned, and to put up at the place therein designated 14 additional fire hydrants for the unexpired term of the franchise of the plaintiff, the Owensboro Water Works Co., in consideration of which defendant therein and thereby rented of this plaintiff, the Owensboro Water Works Company, said additional fire hydrants for said unexpired term, and promised to pay therefor, during such term, at the rate of $40. each per annum, payable quarterly at the times hereinbefore stipulated for the rent of existing fire hydrants, and further provided that said ordinance should become binding as a contract between defendant and this plaintiff, the Owensboro Water Works Company, on condition that said Company, within 60 days from the passage of said ordinance, should file with the City Clerk its written acceptance thereof, and thereafter, and within 60 days said Company filed, with the Clerk of defendant City, its written acceptance thereof, which written acceptance is in the posession of defendant. Plaintiffs file herewith, as part hereof, copy of said ordinance, marked Exhibit #8, and states that said Company, within a few months thereafter duly constructed said additional pipes, mains and hydrants and in all respects duly carried out each and every stipulation in said ordinance, agreed to be done and performed by it, and did duly furnish water for both public and private uses, through said pipes, mains and hydrants, to said city, and its inhabitants, from that period until now.

169 Plaintiffs state that thereafter, at the following dates, the mayor and council of defendant city, duly enacted and the mayor approved, certain ordinances as follows, to-wit:

November 7, 1892, in and by which defendant city requested and ordered plaintiff, the Owensboro Water Works Co., to lay in the streets of said city, certain mains therein mentioned, and erect three additional fire hydrants, at the places therein designated.

November 21, 1892, in and by which defendant city requested and ordered plaintiff, the Owensboro Water Works Co., to lay, in the streets of said city, certain mains therein mentioned, and erect one additional fire hydrant, at the place therein designated.

December 5, 1892, in and by which defendant city requested and ordered plaintiff, the Owensboro Water Works Co., to lay in the streets of said city, certain mains therein mentioned, and erect one additional fire hydrant, at the place therein designated.

May 7, 1894, in and by which defendant city requested and ordered plaintiff, the Owensboro Water Works Co., to lay, in the streets of said City, certain mains therein mentioned, and erect one additional fire hydrant, at the place therein designated.

July 16, 1894, in and by which defendant City requested and ordered plaintiff, the Owensboro Water Works Co., to lay, in the streets of said City, certain mains therein mentioned, and erect one additiontl fire hydrants, at the place therein designated.

October 1, 1894, in and by which defendant city requested and ordered plaintiff, the Owensboro Water Works Co., to lay in the streets of said city, certain mains therein mentioned, and erect six additional fire hydrants, at the places therein designated.

170 September 16, 1895, in and by which defendant city requested and ordered plaintiff, the Owensboro Water Works Co., to lay in the streets of said city, certain mains therein mentioned, and erect three additional fire hydrants, at the place therein designated.

October 29, 1895, in and by which defendant city requested and ordered plaintiff, the Owensboro Water Works Co., to lay in the streets of said city, certain mains therein mentioned, and erect one additional fire hydrant, at the place therein designated.

May 15, 1899, in and by which defendant city requested and ordered plaintiff, the Owensboro Water Works Co., to lay in the streets of said city certain mains therein mentioned, and erect three additional fire hydrants, at the place therein designated.

July 25, 1900, in and by which defendant city requested and ordered plaintiff, the Owensboro Water Works Co., to lay in the streets of said city, certain mains therein mentioned, and erect one additional fire hydrant, at the place therein designated.

Plaintiffs further state that defendant in and by each of said ordinances, requested said extensions and fire hydrants to be made and placed for the unexpired term of the franchise of this plaintiff, the Owensboro Water Works Company, and in consideration that it would make said extension and erect said hydrants, the defendant, in and by said ordinances, rented of it said additional fire hydrants for said unexpired term, and promised to pay therefor, during such

term, at the rate of $40. each per annum, payable quarterly, at the times hereinbefore stipulated, for the rent of the *ten* existing fire hydrants.

Plaintiffs further state that the plaintiff, the Owensboro Water Works Co., within sixty days from the passage of each of said ordinances, filed with the city clerk its written acceptances thereof, all of which acceptances are now in the possession of defendant. That

171 plaintiff, the Owensboro Water Works Co., within a few months after the passage of each of said ordinances, duly constructed said additional pipes, mains and hydrants, and in all respects duly carried out each and every stipulation in said respective ordinances agreed to be done and performed by it, and did duly furnish water for both public and private uses through said pipes, mains and hydrants to said city and its inhabitants, from said respective periods, until now, Plaintiffs file herewith, as part hereof, copies of said ordinances, marked Exhibits, as follows: November 7, 1892, #9; November 21, 1892, No. 10; December 5, 1892, No. 11; May 7, 1894, No. 12; July 16, 1894, No. 13; October 1, 1894, No. 14; September 16, 1895, No. 15; October 29, 1895, No. 16; May 15, 1899, No. 17; July 25, 1900, No. 18.

Plaintiffs further state that ever since the passage of said ordinance of June 3 1889, up to this time, the plaintiff, the Owensboro Water Works Co., has been furnishing Water to the defendant city through said pipes and hydrants and during all of said time defendant has used said hydrants and plaintiffs' system of water works for the purposes of fire protection, and has had no other means of extinguishing fires, during said period, and now has no other means; that during all said time defendant City has paid to plaintiff- said stipulated water rentals upon said 163 hydrants, at the times stipulated in said ordinances, with the exception of the period from July 1, 1897, to March 31, 1898, which rentals are in litigation, the city claiming to off-set same with tax claims against these plaintiffs, and excepting the period from April 1st, to September 30, 1900, and from April 1, 1902 to June 30, 1903, which rents are in litigation in an action pending in this court.

172 Plaintiffs further state that no part of the rentals provided for in said ordinances, and due and payable at quarters ending September 30, 1903, and December 31, 1903, have been paid, though long past due. Plaintiffs further state that *that* the plaintiff, the Owensboro Water Works Co., has fully accounted for, and paid to the plaintiff, the American Loan & Trust Co., the amount due for said hydrants for said period, from July 1, 1903, to December 31, 1903, and on February 4, 1904, the plaintiff, American Loan & Trust Company, in writing, sold, assigned and transferred to this plaintiff, Owensboro Water Works Co., all right, title, interest and claim, which said American Loan & Trust Co., acquired under and by virtue of a mortgage to it of date July 1, 1889, which was made and executed by plaintiff, Owensboro Water Works Co. Said writing is filed herewith as an exhibit, Marked #19.

Wherefore, Plaintiffs pray judgment against defendant for the sum of $1880, with interest from October 1, 1903, and the further

sum of $1880, with interest from December 31, 1903, and their cost herein expended, and for all proper relief.

SWEENEY, ELLIS & SWEENEY, AND LITTLE & SLACK,

Plaintiffs' Attorneys.

(Filed May 27, 1904.)

STATE OF KENTUCKY,
Daviess Circuit Court:

I, Tandy L. Harl, Clerk of the Daviess Circuit Court in and for the County of Daviess and State of Kentucky, certify that the foregoing 27 pages constitute a full and complete transcript of the Petition filed in this office on the 27th day of May, 1904, and now on file in my office, of the Owensboro Water Works Company,
173 &c., against the City of Owensboro, as fully appears from said petition.

Witness my hand and seal of office, this 11th day of November, 1914.

[SEAL.] TANDY L. HARL, *Clerk.*

Order of Submission.

Entered by Judge Evans, December 10th, 1914.

This cause coming on this day for final hearing, the plaintiff appeared by Wm. T. Ellis and Clarence M. Finn, its counsel, and the defendant appeared by George S. Wilson, Ben D. Ringo and La Vega Clements, its counsel. The parties tendered a Stipulation of Facts in writing, which is now ordered filed. The Oral testimony of James J. Sweeney was heard and the cause was argued by counsel for the respective parties and the Court not being sufficient advised thereof, it is now ordered that it be submitted to the court on the following record:

Bill in Equity, together with Exhibits filed therewith and referred to therein;

Answer, together with the Exhibits filed therewith and referred to therein;

Stipulation filed November 21st, 1914;

Stipulation of Facts filed December 10th, 1914;

Testimony of James J. Sweeney, taken at the final hearing December 10th, 1914.

174 *Stipulation of Facts.*

Filed December 10th, A. D. 1914.

In order to avoid the necessity of taking proof, it is agreed between complainant and defendant as follows:

1. That The Owensboro Water Works Company, of Owensboro, Kentucky, is a corporation organized under the laws of the Commonwealth of Kentucky, and a correct copy of its charter is attached to the bill as an exhibit, and may be used as evidence in this cause; and

a correct copy of its Amended Articles of Incorporation is attached to the bill as an exhibit, and may be used as evidence in this cause.

2. That the ordinance of June 3rd, 1889, as copied into the bill, is a correct copy of the ordinance passed by the City of Owensboro.

3. That complainant company has a water works system in the City of Owensboro which it maintains in said City, and it is engaged in the furnishing to many of the inhabitants of the city of Owensboro water for domestic purposes; and its property is worth not less than $25,000.00; and the value of its franchise or right to maintain, complete and operate water works in the City of Owensboro for supplying the city of Owensboro, and the inhabitants of said city, and its vicinity, with water for public and private purposes, and to use within the present and future limit of Owensboro, the streets, alleys, and other public highways thereof for the purpose of laying, repairing and taking up mains, service pipes, hydrants and other apparatus for the supply of water if it has such right or franchise, is of greater value than $10,000.00.

4. That the ordinance adopted by the city on November
175 7th, 1901, and which ordinance is copied in full in the bill of complaint, is correctly copied into the bill and is a correct copy of the ordinance passed by the city of Owensboro.

5. That the ordinance, or resolution, adopted by the city on July 6th, 1914, and copied into the bill of complaint, is correctly copied into said bill and is a correct copy of the ordinance, or resolution, passed by the city of Owensboro.

6. It is further stipulated and agreed that the defendant, City of Owensboro, was created a minucipal corporation by the act of the General Assembly of Kentucky referred to in the bill, which becomes a law February 16th, 1866, and that it was thereafter continued as a minicipal corporation under acts of the General Assembly, one of which was approved March 6th, 1876; another approved March 18th, 1882, and another entitled "An Act for the Government of Cities of the Third Class", which become a law June 14th, 1893, and that these several acts of the Kentucky Legislature may be treated as if referred to and copied at length as exhibits with the bill, and may be used as evidence herein.

7. It is further stipulated and agreed that the ordinance of date September 10th, 1878, and referred to and copied in the answer of defendant herein, was duly and regularly passed by the Common Council of the City of Owensboro and approved by the Mayor and become a valid and subsisting ordinance according to its terms, and that it is correctly copied in the answer and may be used as evidence herein.

8. It is further agreed that the written acceptance of The Owensboro Water Works Company, of Owensboro, Kentucky, of the terms of the ordinance of June 3rd, 1889, was duly filed with defendant city, as provided for in said ordinance.

9. It is further agreed that the ordinance of February 2nd, 1891, referred to in the answer, was duly passed by the Mayor and Common Council of the City of Owensboro and is correctly set
176 out in the exhibit filed with the answer as exhibit No. 2, and was duly accepted by complainant by the writing filed with exhibit No. 2, and that both may be read as evidence herein.

10. It is further agreed that the following ordinances were each passed by the Mayor and Common Council of the City of Owensboro, and each of them duly accepted by the complainant, to-wit: An ordinance of date October 6th, 1890, and filed with the answer as exhibit No. 1; and ordinance of February 7th, 1891, and filed with the answer as exhibit No. 2; an ordinance of November 7th, 1892, and filed with the bill as exhibit No. 3; an ordinance of December 5th, 1892, and filed with the bill as exhibit No. 4; an ordinance of October 1st, 1894, and filed with the bill as exhibit No. 5; an ordinance of May 7th, 1894, and filed with the bill as exhibit No. 6; an ordinance of September 16th, 1895, and filed with the bill as exhibit No. 7. It is agreed that each of the above ordinances are correctly copied in the respective exhibits and may be read as evidence.

11. It is further stipulated and agreed that during the year 1903, and immediately subsequent thereto, the defendant, City of Owensboro, did erect, construct and equip a large modern and complete water works system, fully adequate to supply the citizens of Owensboro and vicinity with pure and wholesome water, which system cost approximately $4,000,000.00, and which has since been and now is maintained and operated by defendant city pursuant to the purpose for which it was erected.

12. It is further stipulated and agreed that on September 21st, 1903, the complainant, Owensboro Water Works Company, filed its bill in *f*equity in the circuit court of the United States for the Western District of Kentucky, at Owensboro, being equity action No. 137 upon the docket of that court, and that this bill is correctly copied and filed with the answer as exhibit M; and thereafter the
177 complainant filed an amendment to said bill on October 21st, 1903, and that this amendment is correctly copied and filed with the answer as exhibit N; and that each of these papers may be read as evidence herein.

13. It is further stipulated and agreed that on *any* May 27th, 1904, the complainant filed its petition against the City of Owensboro in the Daviess Circuit Court of Kentucky, and that said court had jurisdiction of the subject of that petition and of the parties thereto. and that the copy of said petition as filed with the answer and marked Exhibit K, is a correct copy thereof and may be uses as evidence herein.

14. It is further agree and understood that any exhibit referred to in the bill and answer, and not herein specifically mentioned above, shall be treated as correctly copied and shall be read as evidence herein.

In testimony of the foregoing, witness the signatures of the parties hereto by their respective attorneys.

THE OWENSBORO WATER WORKS COMPANY, OF OWENSBORO, KY.,
By W. T. ELLIS,
C. M. FINN.
CITY OF OWENSBORO,
By LA VEGA CLEMENTS,
GEORGE S. WILSON,
BEN D. RINGO.

178 *Order Filing Opinion.*

Entered by Judge Evans December 17th, A. D. 1914.

The Court being now sufficiently advised of the questions arising upon the final hearing and submission of this case on the merits, delivered its opinion in writing, which is now filed.

Opinion Delivered by Judge Evans.

Filed December 17th, A. D. 1914.

Though we have given this case very careful consideration upon all the points discussed at the hearing, it seems to be quite unnecessary to do more than briefly state the conclusions reached upon the several propositions upon which our decision must turn.

I.

The City needed a water supply system, and to meet this want the Owensboro Water Company (hereinafter called the Water Co.), which was a corporation organized under the laws of Kentucky, on Sept. 9, 1878, by an ordinance then duly enacted by the defendant City, was granted the necessary franchise to enable it to use the streets of the City for the purpose indicated.

179 II.

The City afterwards grew quite rapidly and apparently the capacity of the Water Co., become somewhat inadequate to meet the increasing demands upon it by the City and its inhabitants. The law of Kentucky authorizing the organization of corporations generally, was embraced in Chapter 56 of the General Statutes which had been adopted by the Act approved April 22, 1873. Under this law the complainant (which we shall call the Water Works Co.) in 1889 adopted, in due form, its articles of incorporation, and was organized thereunder with a large capital. Evidently it was contemplated that the Water Works Co., would purchase the plant of its inadequate predecessor, the Water Co. Before it would do this, however, and expend the large sums necessary to achieve the objects in view, it desired to be assured of the consent of the City by a grant from it of the necessary franchise and permission to use the City's alleys and other public highways. The City thereupon duly enacted an ordinance on June 3, 1889, granting to the Water Works Co. the desired franchise and permission. Thereafter, and upon the faith of this ordinance, the Water Works Co. purchased and paid for the plant of the Water Co., and proceeded to construct and put in operation the additional facilities needed for supplying the City and its inhabitants with water. This ordinance, by the consent of all parties in interest, substituted the Water Works Co *to* the Water

Co. in the contract of the latter to supply the City with hydrants at certain public places and also *enter* for other public purposes for a period of 25 years from Sept. 9, 1878.

III.

After April 22, 1873, and until 1893, the General Statutes were in force, and, so far as applicable to present purposes, its provisions were as follows:

Section 1 permitted any number of persons to "associate themselves together and become incorporated for the transaction
180 of any lawful business except banking and insurance and the construction of railroads." Section 3 required that articles of incorporation should be adopted, acknowledged and recorded. Section 4 prescribed what the articles should specify, and Section 5 directed what notice should be published. Section 7 contained the following provision, admittedly of great importance at this point. Its language was "Corporations for the construction of any work of internal improvement may be formed to endure for fifty years; those formed for other purposes shall not exceed twenty-five years in duration; but in either case they may be renewed from time to time for periods not greater than was at first permissible, if three-fourths of the vote cast at any regular election held for that purpose shall be in favor of such renewal."

The articles of incorporation of the complainant Water Works Co., expressly set forth — article 6 its claim to the benefit of this last provision, but that concerns us now only to the extent of saying that by the consent and vote of the requisite number of its shareholders the Water Works Co., by duly executed amendments to its articles in May 1914 extended the period of its existence for 25 years from June 1st, 1914.

It may be noted that by laws enacted in July 1893, after the adoption of the present constitution of the State in 1891, the General Statutes were superseded by the compilation known as the Kentucky Statutes, and that under chapter 32 of that compilation no time limit is fixed upon the life of corporations now created, and Sections 559 and 574 of the Kentucky Statutes found in that Chapter are as follows:

"Sec. 559. Any corporation may by the consent in writing of the owner of at least two-thirds of its capital stock, change or amend any of the articles of its incorporation, and such alteration or amendment shall be signed and acknowledged by the directors, or a majority of them, and filed and record as articles of incorporation are required to be."

"Sec. 574. The charter or articles of incorporation of any corporation heretofore created or organized under or by the laws of this State may, after such corporation has accepted, as herein provided, the provisions of the Constitution, be amended in the man-
181 ner provided for the amendment of the articles of incorporation or corporations organized under this chapter and the laws relating to such corporations."

IV.

The ordinance of June 3, 1889, after reciting in its preamble certain reasons for its enactment, did, in fact, enact and publish that ordinance in this explicit language, viz.:

"Sec. 1. That in consideration of the purchase by the Owensboro Water Works Company, of Owensboro, Kentucky, of the water works of the Owensboro Water Company, the franchise and license are hereby granted to the Owensboro Water Works Company, of Owensboro, Kentucky, and to its successors and assigns, for and during the existence of the said corporation, to maintain, complete and operate water works in the City of Owensboro for supplying the city of Owensboro and the inhabitants of said city and its vicinity with water for public and private purposes, and to use within the present and future limits of the city of Owensboro, the streets, alleys and other public highways thereof for the purpose of laying, repairing and taking up mains, service pipes, hydrants, and other apparatus for the supply of water.

"But there shall be no continued unreasonable obstruction of the said streets, alleys and other public highways, and after their use from time to time, they shall be restored by the said water works company as near as practicable to their former condition; and the said grant is subject to the existing right of purchase of the said water works by the said City of Owensboro.

"Sec. 2. That, in like consideration of the said purchase, by the Owensboro Water Works Company, of Owensboro, Kentucky, of the Water Works of the Owensboro Water Company, the City of Owensboro hereby accepts the said The Owensboro Water Works Company of Owensboro, Kentucky, as the successor to the contract for hydrant rental now existing between the City of Owensboro and the Owensboro Water Company as fully as if such existing contracts had been originally made by the City of Owensboro with the said The Owensboro Water Works Company, of Owensboro, Kentucky, without the intervention of the said Owensboro Water Company.

"Sec. 3. That the consent of the City of Owensboro is hereby given to the consummation of the said purchase of the said water works of the Owensboro Water Company by the Owensboro Water Works Company of Owensboro, Kentucky, and upon such consummation the mayor and city clerk of the City of Owensboro are hereby authorized and instructed to seal duplicate copies of the ordinances with the seal of the city of Owensboro, and to sign such copies as a contract between the City of Owensboro, and the Owensboro Water Works Company, of Owensboro, Kentucky, and to deliver one of such copies so signed and sealed to the Owensboro Water Works Company of Owensboro, Ky., and to accept the other in behalf of the City of Owensboro, when signed and sealed by the said The Owensboro Water Works Company, of Owensboro, Kentucky."

"Sec. 4. This ordinance shall take effect at its passage and publication."

Counsel seem to be in accord in the view that the rights of the parties must depend upon a proper construction of the first section

of the foregoing ordinance. It is contended for the City that the words therein: "That in consideration of the purchase by
182 the Owensboro Water Works Company of Owensboro, Kentucky, of the water works of the Owensboro Water Company, the franchise and license are hereby granted to the Owensboro Water Works Company of Owensboro, Kentucky, and to its successors and assigns for and during the existence of said corporation, to maintain, complete and operate water works in the City of Owensboro," &c., and especially that the words, "during the existence of said corporation," refer to the Water Co. and not to the Water Works Co., and counsel illustrate their argument by reference to the ordinance of September 10th, 1878, and particularly Section 13 thereof, but it cannot be forgotten that this last ordinance was enacted about eleven years before that of June 3, 1889, and had reference alone to the Water Co. and not to the complainant, which was not then in existence.

We think it entirely clear from every point of view that defendant's contention is not maintainable, and that the manifest meaning of the language quoted from Section 1 of the ordinance of June 3, 1889, is to grant the franchise and license referred to therein to the complainant for and during its existence. The language of Section 1 means that and nothing else, and hence we must ascertain what was meant by the phrase "during the existence" of that corporation. Did it mean its existence as then limited to 25 years, or did it mean the existence of the Water Works Co. under the potentialities of the Sixth of its articles of incorporation and the law of Kentucky under which those articles were adopted? Remembering that the complainant Company was given its general powers by the State alone but that the City having been given by the legislature the power of control over its streets, &c., it could grant the franchise and license specified in the ordinance of June 3, 1889, we think the City must be held to have enacted the last named ordinance in contemplation of the exercise by the Water Works Co. of the right of ex-
183 tending or renewing from time to time the period of its existence, and especially as amendments thereto when adopted became part of the original articles as expressly provided in Section 540, Kentucky Statutes, Chapter 32. If this be the correct view the complainant corporation has never ceased to exist, but is still in existence, and may, possibly, at its option, by the required vote, extend that existence indefinitely.

V.

Speaking generally, the recent case of City of Owensboro vs. Cumberland Telephone Company, 230 U. S. 58, seems to be conclusive of this case.

And it may be that what was said by the Supreme Court in the City of Louisville vs. Cumberland Telephone Co., 224 U. S. at page 663 and 664, also has an instructive bearing upon this case.

VI.

The defendant has pleaded separately three certain matters of estoppel, but little or not attention was given either of them at the hearing, and they do not seem to be very forceful.

1. The defendant pleads in estoppel of complainant's right to make the claim now set up, the judgment of the Daviess Circuit Court in a suit brought there by the Water Works Co. to recover from the City certain rentals accruing after Sept. 10, 1903, upon the hydrants and certain compensation for water supplied to the city for public purposes after that date. The City's defense to those claims was that the contract created by the ordinance of September 1878 (and to the right of the Water Co. in which the Water Works Co. has been substituted by the ordinance of June 3, 1889), had been fully performed and had no binding force after September 10, 1903. Necessarily this was limited to such rentals and compensation, as that was the only matter then in litigation and the only question involved in that suit. The Court so adjudged, and no one makes any claim that it was wrong. The complaint in the
184 suit now before us has no reference to the matters litigated in the State Court.

2. The defendant also claims to have relied upon certain acts and conduct of the Water Works Co. as constituting an agreement between them that complainant's rights under the ordinance of June 3, 1889, expired on September 10, 1903, and that, relying thereon, defendant itself created and about 1903, installed its own water supply system, at an expense of $400,000, in order to make it capable of supplying the City and its inhabitants with all the water needed, and claims that these facts and its knowledge of them estop the complainant from now insisting that its rights continued or existed after Sept. 10, 1903. Whether it was wise or unwise, without a previous and definite judicial ascertainment of complainant's rights under its contract for the city to make that expenditure for that purpose, is matter of no present concern. But the fact that the City did make itself a competitor in business, instead of buying complainant's plant as the ordinance of June 3, 1889, expressly reserved the right to do, in no way increases the City's rights as against complainant, and in no way diminishes complainant's rights under the contract undoubtedly created by the ordinance of June 3, 1889, unless we are entirely wrong in our construction of that instrument. If there were no contract between the parties after Sept. 3, 1903, complainant's contentions are wrong, but if there were, then defendant's contentions are wrong. That question can not be determined upon any idea of estoppel, but upon the construction of the ordinance. The City's rights must be thus determined, and it can not destroy any right complainant has by arbitrary exercise of power over a competitor of its own creation. It must be as fair and just as if it had no water works of its own. Besides, it has another great advantage over the complainant for, if it does not purchase under the right reserved in the ordinance of June 3, 1889, it can, by giv-

ing just compensation, condemn complainant's property to
185 its use, while complainant has no such power as against the City; and

3. Certain expressions in complainant's pleadings in suits some time pending in the United States Circuit Court in this District, and in the State Court to the effect that the contract between the parties was for an exact period of 25 years, are relied upon as further matter of estoppel against the claim now made by complainant that it continues to exist. These pleadings were adjusted to the situation as it existed in 1903 and 1904, long before June 1914. It was altogether true at the time those pleadings were filed that the esistence of the complainant Water Works Co. was nominally limited to 25 years; the exigencies of those litigations in no way called for any specific allegation beyond that—certainly not as to the legal right to extend its duration—and the statements then made abundantly met the then requirements of the questions involved. It was, therefore, wholly unnecessary and unimportant that the complainant, under those circumstances, should have shown that the power existed for an extension of that 25 years to other periods of like duration. We can conceive of no estoppel arising out of a situation like this for the contract can not be destroyed by any failure to unnecessarily overplead.

It does not seem to be useful to extend the discussion further, as no one of the matters set up in estoppel is sufficient to bar complainant's right to assert its present claim to the continued existence of its contract, generally, though section 2 of the ordinance of June 3, 1889, explicitly shows that that part of it which specifically related to the stipulation pertaining to hydrant rentals was to terminate in September 1903. And it may not be out of place to emphasize the fact that while complainant purchased the Water Co.'s property in 1889 and agreed to make good the Water Company's contract respecting hydrant rentals until September 1903 and no longer, the complainant did not obtain its corporate powers
186 nor its Owensboro franchise from the Water Co., nor from the ordinance of September 1878, but got them through its own Articles of Incorporation and the ordinance of June 3, 1889, independently of those of the Water Company.

VII.

We recall no other question made by the pleadings or discussed at the bar in any other way calling in question complainant's franchise powers, though there may be certain affirmative allegations in defendant's answer which, standing controverted under Equity Rule No. 31, are not important because not supported by testimony.

VIII.

The City has enacted several ordinances since that of June 3, 1889, with a view merely to regulate the complaiannt's use of its streets, alleys, &c., but these have not been complained of, indeed, the complainant in its bill very properly says:

"Complainant company states that it has at all times and is now willing to comply with all reasonable rules, regulations and conditions which defendant city may in the exercise of its police power, prescribe for the protection of defendant City and its inhabitants against loss, injury or damage by reason of the digging of trenches or making excavations in any street, alley, sidewalk or any of the public grounds of said city for the purpose of laying, or taking up, or repairing any of its water pipes, or any of the connections with its water pipes; and it has at all times, and is now, willing to cause all pavements, curbings and parts of any streets removed by it in the exercise of its franchise to maintain a water works system in the City of Owensboro, Kentucky, to be relaid and repaired in said streets, alleys or avenues, sidewalks or public places to be put in as good condition and repair as the same was immediately preceding such excavation."

But two other ordinances, namely, that of November 7, 1901, (which for many years has apparently lain dormant) and that of July 6th, 1914, copies of which are exhibited with the bill, are now sought to be enforced against complainant upon the idea that its contract, in every event, terminated June 3, 1914.

The ordinance of November 7, 1901, is a long one, and all that need be said of it now is that many of its provisions are subversive of the rights of complainant Water Works Company as those
187 rights have been fixed in the contract between the parties embraced in the ordinance of June 3, 1889.

The ordinance of July 6, 1914, is as follows:

"COUNCIL HALL, July 6, 1914.

"At a meting of the Common Council of Owensboro, held in said city on July 6, 1914, the following resolution was passed to-wit:

"Whereas the franchise heretofore granted by the city of Owensboro to the Owensboro Water Works Company permitting said company to lay its pipes and mains in the streets and alleys of said city has expired, and

"Whereas, the said Owensboro Water Works Company has now neither the right nor the consent of said city to use the streets, alleys or public highways of said City, therefore,

"Be it resolved that the mayor, be and he is, hereby authorized and directed to notify the said Owensboro Water Works Company, that it must cease to dig up or disturb the streets, alleys or public highways of said city in any way whatsoever; and the said Mayor shall take all necessary steps to make said notice and order effective.

"Be it further resolved that the city engineer be, and he is, hereby directed not to grant a permit to dig up or disturb the streets of the city of Owensboro to the Owensboro Water Works Company, nor to any person employed by said company."

Manifestly this ordinance strikes at and was intended to strike at the very existence of the complainant, and at the rights it claims under the contract. Indubitably, therefore, the legislative department of the city, to which the State of Kentucky has delegated power to legislate for certain municipal purposes, by enacting this

ordinance, did that which must inevitably impair the obligation of that contract.

Both of these ordinances, indeed, appear to us to be attempts by the defendant City, through its legislative and other departments, not to regulate within proper bounds, but to impair and indeed to destroy the obligation of the City's contract with complainant. These attempts, if successful, will result in the arbitrary abrogation of the contract without complainant's consent. If this be the correct view the relief prayed for in complainant's bill should be granted, and a decree accordingly may be prepared by counsel and presented for approval, enjoining the enforcement of every part of each of the two last named ordinances, so far as either may conflict with the views herein expressed.

(Signed) WALTER EVANS, *Judge.*

188 *Judgment.*

Entered January 6th, 1915.

The Court having considered all the pleadings, exhibits, and evidence referred to in the order of submission, dated December 10th, 1914, and being advised, delivered a written opinion herein, which opinion is now filed and made a part of this record.

Pursuant to such opinion it is now ordered, adjudged and decreed by the Court that the ordinance of June 3rd, 1889, filed with the bill of complaint, constitutes a contract between complainant company and the city of Owensboro for and during the corporate existence of complainant company; and it is ordered, adjudged and decreed by the Court that under the terms of said ordinance and contract the Owensboro Water Works Company of Owensboro, Kentucky, has conferred upon it, for and during the existence of said corporation, the franchise and license to maintain, complete and operate water works in the City of Owensboro for the purpose of supplying the City of Owensboro and the inhabitants thereof and its vicinity with water for public and private purposes, and to use within the present and future limits of said City the streets, alleys and other public highways thereof for the purpose of laying, repairing and taking up service pipes, hydrants and other apparatus for

189 the supply of water.

It is further ordered, adjudged and decreed by the court that defendant, City of Owensboro, be and it is absolutely and perpetually enjoined from asserting, claiming or pretending to assert or claim that complainant company has no right or franchise, during its corporate existence, to maintain, complete and operate water works in the City of Owensboro; and from asserting, claiming or pretending to assert that complainant company has not the right during its corporate existence, to use within the present and future limits of the City of Owensboro the streets, alleys and other public highways thereof, for the purpose of laying, repairing and taking up mains, service pipes, hydrants and other apparatus for the supply of water.

It is further ordered and decreed that defendant, City of Owens-

boro, and its employes and agents, desist and refrain from any effort to enforce the ordinance or resolution enacted by the Mayor and Common Council of the City of Owensboro on Monday, July 6th, 1914; and it is further ordered and decreed that the defendant, City of Owensboro, and its employes and agents absolutely desist and refrain from claiming or pretending to claim that said City has the right, power or authority, under the ordinance of November 7th 1901, to prohibit complainant company from making the necessary excavations in the streets, alleys and other public highways of the City of Owensboro for the purpose of laying, repairing and taking up its mains, service pipes, hydrants and other apparatus for the supply of water; and to desist and refrain from in any way interfering with complainant company in the full, free and lawful exercise of its franchise rights to use the streets, alleys and public highways of defendant City for the purpose herein recited, for and during the existence of complainant company.

190 Nothing in this decree, however, shall be held to prevent the City of Owensboro from prescribing all reasonable rules and regulations in the lawful exercise of its police power for the protection of defendant City and its inhabitants against loss, injury or damage by reason of the digging of trenches or making of excavations in any street, alley, sidewalk or any of the public grounds of said City for the purpose of laying or taking up or depairing any of its water pipes or any of the connections with its water pipes, and, if so required by the said City of Owensboro, the complainant shall cause all pavements, curbing and parts of any streets removed by it in the exercise of its franchise to maintain a water works system in the City of Owensboro, Kentucky, to be relaid and repaired and such streets, alleys, avenues or sidewalks or public places to be put in as good condition and repair as the same were immediately preceeding such excavation.

It is further ordered, adjudged and decreed that complainant, Owensboro Water Works Company *at* Owensboro, Kentucky, recover of defendant, City of Owensboro, its costs herein expended, and that it may have execution therefor.

And thereupon the said City of Owensboro prays an appeal to the Supreme Court of the United States, which is granted, upon its executing bond in due form and with approved security in the penal sum of Two Hundred and Fifty Dollars if it is not intended to supersede this judgment but in the penal sum of Ten Thousand Dollars if the appeal is to operate as a supersedeas. The defendant City is given leave to file its assignment of errors herein within thirty days, the same not being prepared at the entry of this decree.

Enter- Jan. 6th, 1915.

191 & 192 *Order Filing Assignment of Errors, etc.*

Entered by Judge Evans January 26th, A. D. 1915.

The defendants, under the terms of the Decree entered herein January 6th, 1915, having been granted an appeal to the Supreme

Court of the United States upon the execution of a bond, with approved surety, in the penal sum of Two Hundred and Fifty Dollars, if it is not intended to supersede this judgment, this day appeared by their counsel of record and tendered a bond in the sum of Two Hundred and Fifty Dollars, with J. H. Hickman, and Henry Cline as surety, which bond is not intended to operate as a supersedeas and which is now filed and approved.

It is further ordered that the assignment of errors this day tendered by the defendant be now filed.

Open Court and enter- January 26th, 1915.

193 *Assignment of Errors.*

Filed January 26, 1915.

Now comes the defendant, City of Owensboro, by its attorneys, George S. Wilson, La Vega Clements and Ben D. Ringo, in the above styled cause and makes and files its assignment of errors and says that the decree and judgment entered and rendered in this cause are erroneous and against the just rights of the defendant, City of Owensboro, and are not according to the law in the following particulars, and for the following reasons, to-wit:

First. Because there is no equity in the bill herein and same does not state any cause of action against the defendant, City of Owensboro, and does not entitle the complainant to any relief against the defendant, and upon its face should have been dismissed by the Court, and the District Court erred to the prejudice of defendant's substantial rights in now entering judgment dismissing same with cost.

Second. Because all the rights, franchises and privileges granted to the Owensboro Water Company to in any wise occupy the streets of the defendant City of Owensboro by ordinance dated September 10, 1878, expired on September 10, 1903, at which time the said franchise and privilege expired by limitation, and the Owensboro Water Company ceased to exist.

The ordinance passed by the City of Owensboro and dated June 3, 1889, exhibited with the bill herein did not constitute any contract between the complainant company and the City of Owensboro, but manif-ted only the acceptance of complainant, Owensboro Water Works Company, in lieu of the Owensboro Water Company in the contracts then existing between the Owensboro Water Company and the defendant City.

194 Third. Because all the rights, privileges and franchises ever conferred upon the complainant, Owensboro Water Works Company, by their terms, by the language of the ordinance and the construction placed thereon by the parties expired September 10, 1903. Whatever rights, franchises or privileges the complainant, Owensboro Water Works Company, obtained which formerly belonged to the Owensboro Water Company expired on September 10, 1903; and the ordinance passed by the City of Owensboro and

exhibited in the bill and dated June 3, 1889, did not and does not confer any franchise upon the complainant, Owensboro Water Works Company, or grant to it any privilege or license, except to succeed to the contracts then existing with the Owensboro Water Company.

Fourth. Because whatever rights were granted to the complainant, Owensboro Water Works Company, by the ordinance of June 3, 1889, expired by limitation, by the terms of the ordinance and contract, on September 10, 1903; that the franchise and license thereby granted was to the Owensboro Water Works Company for and during the existence of the Owensboro Water Company and not longer. Or if the said grant under the ordinance of June 3, 1889, did not expire with the corporate life of the Owensboro Water Company, in any event it did not extend beyond June 3, 1914, and expired on said last named date.

Fifth. Because the ordinance of June 3, 1889, did not confer upon complainant, Owensboro Water Works Company, any franchise beyond the period for which said corporation was originally created, to-wit, a period of twenty-five (25) years from and after June 3, 1889.

Sixth. Because under the laws in force in the State of Kentucky on June 3, 1889, and under the Charter of the City of Owensboro then in force, all grants of franchise, license and privileges to corporations were subject to amendment or appeal by the
195 public governing body so granting same, unless a contrary intent was plainly expressed in the act of ordinance constituting such grant; and under section ten of the Charter of the City of Owensboro in force on June 3, 1889, granting to complainant the privilege or license to occupy the streets and other public ways it was plainly and expressly provided that all ordinances passed by the Common Council of said City should be subject to amendment and repeal. The complainant accepted whatever rights were granted to it under said ordinance with knowledge of this law; and the ordinance of July 6th, 1914, denying to the complainant the further right to dig up or disturb the streets of the City was a valid ordinance which the City Council had power and authority to pass and enforce.

Seventh. Because the ordinance of June 3, 1889 had been continually acted upon by both the complainant, Owensboro Water Works Company, and the City of Owensboro and construed to grant no right, franchise or license extending beyond September 10, 1903, or, at most, beyond June 3, 1914, and the District Court erred in refusing to adjudge that complainant was estopped by its acceptance and ratification of said ordinance and by its long acquiesence in the construction and interpretation placed thereon by both the complainant and the defendant herein by which all powers, rights, privileges and franchise granted to the complainant thereby ceased and terminated on June 3, 1914.

Eighth. Because under the laws of the State of Kentucky in force on June 3, 1889, and under the Charter of the City of Owensboro in force on said date, the Common Council of the City of Owensboro did not have any right, power or authority to grant to the complainant any perpetual or irrevocable right, franchise, license or

privilege to use and occupy the streets, of the city with its water pipes, mains or other property or to confer upon the com-
196 plainant any perpetual license and franchise to dig up the streets or lay its pipes and mains therein; and the District Court erred in adjudging that there existed in the Common Council any such power, or that ordinance of June 3, 1889, conferred upon the complainant any perpetual or irrevocable right and franchise to occupy the streets of said City or to lay and maintain therein its pipes and other property.

Ninth. Because the Court erred in adjudging that the complainant now has or had at the time of the filing of its bill herein any license, right, privilege or franchise to further dig up or occupy the streets and public ways in the City of Owensboro.

Tenth. Because the Court erred to the prejudice of defendant's substantial rights in adjudging that the ordinance of July 6, 1914, and complained of in the bill herein, was or is invalid or void, or in violation of the *Construction* of the United States.

Eleventh. Because the Court erred to the prejudice of defendant's substantial rights in adjudging that the defendant, City of Owensboro, be perpetually enjoined from asserting, claiming or pretending to assert or claim that the complainant has no right or franchise during its corporate existence to operate water works in the City of Owensboro and has not the right to use within the present and future limits of the City of Owensboro the streets, alleys and other public ways thereof.

Twelfth. Because the court erred in adjudging that the defendant city of Owensboro and its employes and agents be enjoined to desist and refrain from any effort to enforce the ordinance adopted by the Mayor and Common Council of said City of July 6, 1914, and also enjoined from claiming that the City has the power or authority under the ordinance of November 7, 1901, to prohibit the complainant Company from making excavations in the streets, al-
197 leys and other public highways of the City; and in adjudging that the defendant City and its employes be restrained and enjoined from in any way interfering with the complainant Company in the occupancy and use of the streets, alleys and public ways of defendant City.

Thirteenth. Because the Court erred in decreeing any injunction herein against the defendant, City of Owensboro, or any of its officers, agents, servants or employes.

Fourteenth. Because the decree of the District Court entered herein is contrary to the law and the evidence in this cause and is not supported by any evidence.

Wherefore, the defendant, City of Owensboro, prays that said judgment and decree be reversed.

THE CITY OF OWENSBORO,
KENTUCKY,
By GEO. S. WILSON,
LA VEGA CLEMENTS,
BEN D. RINGO, *Attorneys.*

Bond.

Filed January 26, 1915.

Know all men by these presents, that, we, City of Owensboro, Kentucky, and J. H. Hickman of Owensboro, Ky., and Henry Cline, of Owensboro, Ky., are held and firmly bound unto Owens-
198 boro Water Works Company in the sum of Two Hundred and Fifty ($250.00) Dollars to be paid to the said Owensboro Water Works Company executors or administrators. To which payment well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our, and each of our, heirs, executors, and administrators, firmly by these presents.

Sealed with our seals, and dated this 22nd day of January, A. D. 1915.

Whereas, The above named City of Owensboro hath prosecuted a Writ of Error in the United States Supreme Court, a session of which is to be holden in the city of Washington, D. C., to reverse the judgment rendered in the above entitled suit, by the District Court of the United States for the Western District of Kentucky, at Owensboro.

Now, therefore, the condition of this obligation is such, that if the above named City of Owensboro, Kentucky shall prosecute its said writ of error to effect, and answer, all costs, if it shall fail to make good its plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

CITY OF OWENSBORO,
By J. H. HICKMAN.
J. H. HICKMAN.
HENRY CLINE.

Sealed and delivered in the presence of
M. E. DUNN,
Deputy Clerk U. S. District Court.

199 UNITED STATES OF AMERICA,
Western District of Kentucky, ss:

J. H. Hickman, and Henry Cline, *a* surety on the annexed bond, being duly sworn, deposes and says that they reside at Owensboro, Kentucky, Daviess County, in the — of —— in said District, that they are free holders in the county of Daviess, Kentucky, that they are worth the sum of Two Hundred and Fifty ($250.00) Dollars, over and above all their just debts and liabilities, in property subject to execution and sale, and that their property consists of real estate.

J. H. HICKMAN.
HENRY CLINE.

Sworn to and subscribed before me, this 22nd day of January A. D. 1915.

M. E. DUNN,
Deputy Clerk for said Western District of Kentucky.

200 *Præcipe.*

Filed February 12th, 1915.

The Clerk is requested to incorporate in the transcript of the record for writ of error the entire record in this case omitting all captions of pleadings.

GEO. S. WILSON,
BEN D. RINGO,
LA VEGA CLEMENTS,
Attorneys for Defendant.

We acknowledge service of a copy of the above præcipe, this February 11th, 1915.

W. T. ELLIS,
Attorneys for Plaintiff.

201 *Order Made by Judge Walter Evans March 3rd,* 1915.

It is stipulated between the parties hereto that the evidence in this record taken before Hon. Walter Evans, Judge, at Louisville, Kentucky, on the hearing of this cause and given by Mr. J. J. Sweeney, President of the Complainant Company, was taken and heard as therein recited and may be considered by the court upon appeal as a part of the record herein.

OWENSBORO WATER WORKS COMPANY,
By W. T. ELLIS AND
C. M. FINN,
Att'y-.
CITY OF OWENSBORO,
By GEO. S. WILSON,
LE VAGA CLEMENTS, AND
BEN D. RINGO
Att'y-.

It is ordered that the foregoing stipulation be filed and that pursuant thereto the testimony of J. J. Sweeney be filed and copied into the transcript of the record herein.

202 *Testimony of J. J. Sweeney.*

Filed March 3rd, 1915.

JAMES J. SWEENEY, called for the plaintiff, being duly sworn and examined by Mr. Finn, testified as follows:

Q. Your name is James J. Sweeney?
A. Yes sir.

Q. What connection have you with the complainant, the Owensboro Water Works Company of Owensboro, Kentucky?

A. President and have been President for over ten years.

Q. State to the court whether or not the Owensboro Water Works Company of Owensboro, Kentucky, has a plant which it operates in Owensboro, Kentucky, fully equipped for the purpose of furnishing the city and its inhabitants with pure wholesome water to be used either for public or domestic purposes?

A. It is fully equipped with two pumps and is furnishing the city with wholesome water—not the city but the citizens of the city with wholesome water.

By Mr. B. D. Ringo:

Q. You mean some of the citizens of the City?

A. Yes sir.

This was all the orial evidence introduced.

203 I, A. G. Ronald, Clerk of the District Court of the United States for the Western District of Kentucky, do hereby certify that the foregoing 203 pages contain a true and correct transcript of the record and proceedings in the case of Owensboro Water Works Company against the City of Owensboro, No. 3, In Equity, pending in the Owensboro Division of the United States District Court for the Western District of Kentucky, copied in accordance with the præcipe filed and copied herein, as the same appears from the files and records in my said office.

Witness my hand and the seal of said court this 4th day of March, A. D. 1915.

A. G. RONALD, *Clerk*,
By M. E. DUNN, *D. C.*

Endorsed on cover: File No. 24,608. W. Kentucky D. C. U. S. Term No. 390. City of Owensboro, Kentucky, appellant, vs. Owensboro Water Works Company of Owensboro, Kentucky. Filed March 8th, 1915. File No. 24,608.

FILED
NOV 6 1916
JAMES D. MAHER
CLERK

SUPREME COURT OF THE UNITED STATES

October Term, 1916

No. 79

City of Owensboro - - - Appellant,

VS.

Owensboro Water Works Company of Owensboro, Kentucky - Appellee.

Appeal From the District Court of the United States For the Western District of Kentucky

REPLY BRIEF FOR APPELLANT

By GEORGE W. JOLLY

The Standard Printing Co. (Incorporated), Louisville, Ky.

AUTHORITIES CITED.

Kentucky Stats., Sec. 561;

Clark and Marshall on Private Corporations (1st Ed.), Vol. 2, page 839, Sec. 305;

Bank of Gallipolis v. Trimble, 6 B. Mon. (Ky.) 601, 602;

Daviess County v. Dickinson, 117 U. S. 657, 664;

Louisville & Nashville R. R. Co. v. Palms, 109 U. S. 244, 252, 253;

Mason v. Pewabic Mining Co., 25 Fed. Rep. 882;

Northern Bank v. Porter Township, 110 U. S. 608, 616, 619;

Wells Co. v. Avon Mills, 198 U. S. 177.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1916.

No. 79.

CITY OF OWENSBORO, - - - - - - - - - *Appellant,*

vs.

OWENSBORO WATER WORKS COMPANY, - - *Appellee.*

ARGUMENT IN REPLY TO THE APPELLEE.

May it Please the Court:

It is contended by counsel for the appellee that the court is effectually precluded from considering the legal effect of the provisions of the appellee's charter, and the legal effect of the amendment thereof, although copies of both documents are filed with the appellee's bill and by express averments made parts of it. (Trans. 2, 12, 14.)

This contention is based upon alleged "admissions" in the appellant's answer and upon the first paragraph of the "Stipulation of Facts."

They are as follows:

"The defendant City of Owensboro admits that the Owensboro Water Works Company of Owensboro, Kentucky, the complainant herein, is a corporation created and doing business as set forth in its bill herein; that its original Articles of Incorporation were signed, acknowledged and lodged for record on June 3, A. D., 1889, in the County Clerk's office in Daviess County, Kentucky, and duly recorded therein, and a properly certified copy thereof filed with the Secretary of State for the Commonwealth of Kentucky.

"Defendant admits that by the terms of the said Articles of Incorporation of the complainant herein it is provided that said corporation should terminate in twenty-five years from and after the date of its incorporation; and that by and with the written consent of more than three-fourths of the stockholders of complainant Company, its Board of Directors, on May 6, 1914, did sign, execute and acknowledge Amended Articles of Incorporation and file same in the County Court Clerk's office of Daviess County, Kentucky, and a copy thereof to the Secretary of State for Kentucky wherein and whereby the corporate life of the complainant Company was extended by such amendment to its Articles of Incorporation for a period of twenty-five years from and after June 1, 1914, and that the complainant Company is now a body corporate under the General Corporation laws of the State of Kentucky." * * * (Trans. 21, 22.)

"In order to avoid the necessity of taking proof, it is agreed between complainant and defendant as follows:

"1. That the Owensboro Water Works Company, of Owensboro, Kentucky, is a corporation organized under the laws of the Commonwealth of Kentucky, and a correct copy of its charter is attached to the bill as an exhibit, and may be used as evidence in this cause; and a correct copy of its Amended Articles of Incorporation is attached to the bill as an exhibit, and may be used as evidence in this cause." * * * (Trans. 108, 109.)

It is contended for appellant in reply that the admission is not susceptible of the construction placed upon it by appellee. The admission is surplusage in admitting the due execution of the Charter of Appellee and the amendment, since they were parts of the bill and if not traversed would have stood admitted. Any construction placed upon the legal effect of the documents is the conclusion of the pleader

and will not prevent the court from determining for itself the true interpretation of the charter and amendment, and whether or not the appellee's charter expired on May 31, 1914; whether Section 561 went into effect on June 1, 1914; and whether the amendment ever took effect.

The appellant is a public municipality, and it is not within the legal power of its chief executive officer to make an admission contrary to the legal effect of those documents and contrary to the law, to the injury of the city. It is not within the scope of the agency of the city attorney or any counsel of the city to make any admission contrary to the interests of the city, or the public interests. Nor could an admission be made that would in its effect put the court out of office and deprive it of the power of interpreting the exhibits according to the rules applicable to the matter.

It is respectfully submitted that it would be contrary to public policy to allow a public officer of a municipality, or its agent or attorney, to make a declaration, agreement or admission of record, in a judicial proceeding, contrary to the just rights of the municipality with its twenty-odd thousand inhabitants, and thereby debar the court from exercising its right and power of construing those documents and giving to them such force and effect as they may be, in its opinion, entitled to.

Facts impossible in law cannot be admitted. Nor can an erroneous legal conclusion be admitted. L. & N. R. R. v. Palms, 109 U. S. 244, 252, 253. And an unauthorized declaration or certificate has no effect in law. Northern Bank v. Porter Township, 110 U. S. 608, 616-619; Daviess County v. Dickinson, 117 U. S. 657, 664.

And furthermore it is submitted that, the Stipulation of Facts, made after the answer was filed, sets the matter at large again. It is agreed by appellee as well as appellant, that the charter and amendment, "may be used as evidence in this cause." So, therefore, these two papers are before the court as evidence for whatever they are worth without any modification by admissions, and the court is therefore not debarred from an examination and construction of them in accordance with its own independent judgment.

The suggestion of counsel for appellee that appellee may be a *de facto* corporation is not sustained by the authorities cited. The case of Wells Co. v. Avon Mills, 198 U. S. 177, is an authority for allowing an enquiry collaterally of the question of whether there is a corporation in existence. In Clark and Marshall on Private Corporations (1st Ed.), Vol. 2, p. 839, Sec. 305, it is said:

> "Another mode in which a corporation may be dissolved is by the expiration of a time limited in its charter for the continuance of its corporate existence. * * * When the time during which a corporation is to exist is thus limited by its charter, it is dissolved and ceases to exist upon the expiration of the time limited, and its existence as a corporation cannot be continued after that time, except by legislative authority, even with the consent of all the stockholders or members. According to the better opinion, as was shown in another chapter, a body of men has not even a *de facto* corporate existence after expiration of the time for which its corporate existence is limited by its charter."

A number of cases are cited in support of this text, among them Mason v. Pewabic Mining Co., 25 Fed. 882,

decided by Justice Matthews, and Bank of Gallipolis v. Trimble, 6 B. Mon. (Ky.) 601.

If the appellee's charter expired May 31, 1914; if the amendment could not take effect before June 2, 1914, and if Section 561 Ky. Stats. took effect on June 1, 1914, the amendment could not become effectual for any purpose, and consequently the corporation was dead and there could not be a *de facto* or a *de jure* corporation.

Respectfully submitted,

GEORGE W. JOLLY,
Attorney for Appellant.

SUPREME COURT OF THE UNITED STATES

October Term, 1916

No. 79

City of Owensboro - - - Appellant,

VS.

Owensboro Water Works Company of Owensboro, Kentucky - Appellee.

Appeal From the District Court of the United States For the Western District of Kentucky

SUPPLEMENT TO BRIEF FOR APPELLANT

By GEORGE W. JOLLY

The Standard Printing Co. (Incorporated), Louisville, Ky.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1916.

No. 79.

CITY OF OWENSBORO, - - - - - - - *Appellant,*

vs.

OWENSBORO WATER WORKS COMPANY, - - *Appellee.*

SUPPLEMENT TO BRIEF FOR APPELLANT.

May it Please the Court:

We beg leave to file the following copy of an opinion of the Court of Appeals of Kentucky, delivered November 2, 1916:

Meridian Life Ins. Co. vs. Milam. (Court of Appeals of Kentucky. Nov. 2, 1916.)

Miller, C. J. On June 8, 1914, the appellant, the Meridian Life Insurance Company, of Indianapolis, Ind., issued its policy contract to James W. Milam, whereby, in consideration of a promise of $49.18 then paid, and the agreement of Milam to pay a like sum annually on June 8th for eight years thereafter, and after the expiration of the nine years to pay an annual premium of $98.36, it insured the life of James W. Milam for $2,500. Mary C. Milam, the wife of James W. Milam, was named as the beneficiary in the policy. James W. Milam died on June 8, 1915; and, proofs of death having been made,

and the company having declined to pay the policy, Mary C. Milam filed this action on September 2, 1915, to recover the amount named in the policy.

There is no dispute about the facts of this case; the controverted questions relate solely to the law of the case. The policy contains this provision:

> "This policy shall not be in force until the first premium has been paid thereon, and the policy duly delivered during the lifetime and good health of the insured."

It also contained this further provision:

> "In case of death after one year from the date hereof this policy shall be incontestable, except for non-payment of premiums, provided the covenant for military and naval service in time of war, as provided in the application, shall have been complied with."

By his application, which is made a part of the contract of insurance, Milam agreed:

> "That death by my own hands, or occasioned by my own act, whether voluntary or involuntary, whether I be sane or insane, or whether death be intended or anticipated as the result of such act, or in consequence the actual or attempted violation of the law, within one year from the date of any policy issued hereunder, shall invalidate the insurance and forfeit the payment of the company."

By way of defense the answer alleged: (1) That, while the policy bears date June 8, 1914, it was not actually delivered until June 13, 1914; (2) that Milam, the insured, committed suicide on June 8, 1915, which was within one year from the date of the policy, and that, by the terms of the application above set forth, all

liability under the policy was thereby annulled; and (3) that the policy was procured by fraud in this respect, that at the time of and before the date of the policy, Milam was affected with gallstones and that he fraudulently concealed that fact, and represented that he had never suffered from that disease.

The circuit court sustained a general demurrer to the answer; and, the defendant having declined to further plead, judgment went for the plaintiff for the amount of the policy. The company appeals.

The governing point upon which the whole case hinges is this: Did Milam die after one year from the date of the policy? If he did, the policy, by its terms, is incontestable, and the judgment of the circuit court was right.

[1] 1. In order to avoid the effect of the one year clause after which the policy could not be contested, the company alleged, and now contends, that while the policy bears date June 8, 1914, yet, as a matter of fact, the policy was not delivered, or the first premium paid, until June 13, 1914; and that, Milam having died on June 8, 1915, he dies within a year "from the date" of the policy.

We see no merit in this contention. While it is true that insurance companies frequently, and we believe usually, do not deliver a policy upon the day of its date, nevertheless all the provisions of the policy as to payments of future premiums, its maturity if it runs for a term, and similar provisions, are calculated from the day

of its date. Of course, the insured can contract for a policy to be dated on any date after the date of his applications; but, as a matter of routine business, policies are usually dated either according to the date of the application, or of its execution, and are subsequently delivered without any question being made upon that subject. But the rights of the parties to the contract are determined by the date, and all future premiums are to be paid accordingly.

If Milam had died on June 12, 1915, without having paid his second premium due on June 8, 1915, could it be said that his policy had not lapsed for failure to pay the premium when due, according to the terms of the contract? Under such a state of case would the company concede that his policy was in force on June 12, 1915, and that Milam had until that day to pay the premium? We think not. Furthermore, the policy, by its terms, provides that the period of incontestability shall be calculated "from the date" of the policy, not from the date of its delivery. So by the very terms of the policy the one-year period of incontestability began to run on June 8, 1914.

2. The company further insists, however, that if June 8th is to control as the date of the policy, then Milam died within one year from that date, and the policy is contestable under the provisions avoiding it for suicide and fraud, and that the demurrer to the answer relying upon those defenses was improperly sustained.

So, speaking concretely, the case resolves itself to this: Was June 8, 1915, the day of Milam's death within or after one year from June 8, 1914?

[2, 3] The rule in regard to the computation of time is well settled, and is this: When the computation is to be made from the act done, the day on which the act is done must be included; but, when the computation is to be made from the day itself, and not from the act done, then the day on which the act is done must be excluded from the computation. Handley v. Cunningham, 12 Bush, 401; Mooar v. Covington City National Bank, 80 Ky. 307; Board of Councilmen of Frankfort v. Farmers' Bank of Kentucky, 105 Ky. 811, 49 S. W. 811, 20 Ky. Law Rep. 1635; Erwin v. Benton, 120 Ky. 548, 87 S. W. 291, 27 Ky. Law Rep. 909, 9 Ann. Cas. 264; Geneva Cooperage Co. v. Brown, 124 Ky. 16, 98 S. W. 279, 30 Ky. Law Rep. 272, 124 Ann. St. Rep. 388; Newton v. Ogden, 126 Ky. 101, 102 S. W. 865, 31 Ky. Law Rep. 549; Louisville Ry. Co. v. Wellington, 137 Ky. 728, 126 S. W. 370, 128 S. W. 1077; and the case there cited; and Lowry v. Stotts, 138 Ky. 251, 127 S. W. 789. The working of the rule may be illustrated by reciting the facts and the conclusions reached in two of the cases cited.

In Handley v. Cunningham, *supra,* the question was whether the act of 1871 reducing the legal rate of interest from 10 per cent. to 8 per cent. was in force on September 1st of that year, the date of the notes in question. The statute provided that it should "take effect and be in force from and after the first day of September,

1871." The court applied the rule that, when the time is counted from a day, the day was not to be included, and heed that the act of 1871 was not in force on September 1, 1871. East Tennessee Tel. Co. v. Board of Councilmen, etc., 142 Ky. 408, 134 S. W. 475, is also a good illustration of this application of the rule. But in Board of Councilmen of Frankfort v. Farmers' Bank of Kentucky, *supra,* the statute required that an appeal should not be granted except within two years next after the right of appeal has accrued. In that case the judgment was rendered on January 21, 1896; the appeal was granted on January 21, 1898. It was held that the appeal had not been granted within two years next after the judgment had been rendered, because the two years expired on January 20, 1898, the day before the appeal was granted.

In the case at bar, therefore, the year of incontestability must be computed from the dating of the policy, which was an act done on June 8, 1914. Manifestly, therefore, June 8, 1914, must be included in the computation, and the first year of the policy expired on June 7, 1915. Otherwise the year would have contained 366 days, instead of 365 days. But by the terms of the policy the insured was not required to pay the second premium until the first day of the second year, and as there are no parts of days to be considered, he had all of June 8, 1915, in which to pay the second premium; and consequently the policy remained in force throughout that day. Milam having died on June 8, 1915, while the policy was

in force, and not contestable, it became a charge against the company. The fact that he had not paid the premium for the second year when he died cannot affect the appellee's rights under the policy, since Milam was not then in default in the payment of any premium. Indeed, the company does not claim that the policy lapsed for failure to pay the second premium.

It follows, therefore, that since Milam did not die within one year from the date of the policy, it was incontestable upon either ground relied upon, and that the circuit court properly sustained the demurrer to the answer.

Judgment affirmed.

It is now published in the Advance Sheets Kentucky Reports, Vol. 172, No. 1, page 75, *et seq.*, also in the Southwestern Reporter, Vol. 188, page 879, *et seq.*

Respectfully submitted,

GEORGE W. JOLLY,

Attorney for Appellant.

MESSRS. DEAN, RINGO AND CLEMENTS,

Of Counsel.

February 14, 1917.

FILED
OCT 30 1916
JAMES D. MAHER
CLERK

Supreme Court of the United States

October Term, 1916

No. 79

City of Owensboro, - - - - Appellant,

VS.

Owensboro Water Works Company of Owensboro, Kentucky, - - Appellee.

Appeal From the District Court of the United States For the Western District of Kentucky.

BRIEF AND ARGUMENT FOR APPELLANT

By GEORGE W. JOLLY

The Standard Printing Co. (Incorporated), Louisville, Ky.

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5. List of cases referred to alphabetically arranged, with reference to pages of brief where cited **printed in heavy type.** Also reference to constitutional provisions and statutes.

Cases and Statutes cited in support of the fourth point above stated:

Bateman v. Megowan, 1 Met. 533,
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Commonwealth v. Shelton, 99 Ky. 120,
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Combs v. Eversole, 114 Ky. 225,
CITED 3, 17.

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Handley v. Cunningham, 12 Bush 402,
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Home Bldg. Assn. v. Bruner, 134 Ky. 361,
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Long v. Hughes, 1 Duvall 387,
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Mooar v. Cov. Natl. Bank, 80 Ky. 305,
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Machine Co. v. Iron Works, 23 Ky. L. R. 2164,
CITED 3, 17.

Newton v. Ogden, 126 Ky. 103,
CITED 3, 17.

Owen v. Howard Ins. Co., 87 Ky. 572,
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Smith v. Lawler & Son, 25 Ky. L. R. 1782,
CITED 3, 17.

White v. Crutcher, 1 Bush 472,
CITED 3, 17.

Wilson's Admr. v. I. C. R. R. Co., 29 Ky. L. R. 148.
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Wood v. Commonwealth, 11 Bush 220,
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SUPREME COURT CASES:

Arnold v. United States, 9 Cranch 104,
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Best v. Polk, 18 Wall. 112,
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Sheets v. Sheldon's Lessee, 2 Wall. 177,
CITED 4, 7.

Taylor v. Brown, 147 U. S. 640,
CITED 4, 18.

STATUTES:

General Statutes of Ky. (1873) Ch. 56, sec. 7,
CITED 4.

Kentucky Statutes (1893) secs. 559, 574, 453,
CITED 5, 7, 18.

Same, sec. 561,
CITED 7, 12, 28.

INTERNAL IMPROVEMENT:

5 U. S. St. Large (L. & B.) Ch. XIV, pp. 453, 455,
CITED 19, 20.

Benton's Thirty Years View, Vol. I, Ch. X,
CITED 20.

McMaster's History of People of United States, Vols. III and IV,
CITED 20.

Collins' History of Kentucky, Vol. I, 537, 553,
CITED 22.

Osborne v. County of Adams, 106 U. S. 181, and same case 109 U. S. 1,
CITED 23, 24.

Blair v. Cuming, 111 U. S. 363,
CITED 25, 26, 27.

Burlington v. Beasley, 94 U. S. 310,
CITED 23.



Supreme Court of the United States

CITY OF OWENSBORO, - - - - - - - *Appellant,*

vs.

OWENSBORO WATER WORKS COMPANY,
of Owensboro, Kentucky, - - - *Appellee.*

BRIEF AND ARGUMENT FOR APPELLANT.

ASSIGNMENT OF ERRORS.

The errors of law especially relied on in this brief are set out in the assignment of errors and numbered 1, 9, 10, 11, 12, 13, and 14, and the Court "may notice a plain error not assigned or specified." (Transcript pp. 120-122.)

May it Please the Court:

STATEMENT AND BRIEF.

The appellee, the Owensboro Water Works Company, was organized under the general corporation law of Kentucky of 1873, contained in the General Statutes of that year as Chapter 56, the seventh section of which authorizes corporations to be organized for internal improvements for fifty years; and limits the duration of all other corporations to twenty-five years. The appellee's duration was limited to twenty-five years com-

mencing on June 1, 1889. Its corporate existence necessarily terminated on May 31, 1914. Corporations organized under this law of 1873 were permitted by the express terms of Sec. 7 to extend from time to time their corporate existence for a period not exceeding the original term. (Appendix A.)

The appellee made an ineffectual attempt to amend its articles of incorporation, extending its corporate existence "from and after" the 1st day of June, 1914, for another term of 25 years. Ineffectual, because Section 561 of the new general corporation law distinctly provides that when the charter of a corporation expires by limitation it shall not thereafter act for any other purpose than to close up its business as speedily as possible.

The new corporation law confers power, after a corporation has accepted the provisions of the new Constitution, to amend its charter.

The corporate existence of the appellee water works company expired by the terms of its articles of incorporation on May 31, 1914. And it could thereafter continue to act for the purpose of closing up its business, but for no other purpose.

The coming into existence was an act of the appellee, and that act took place on the first day of June, 1889. This is expressly so stated in the sixth section of its articles of incorporation.

Now, it is a fixed rule in Kentucky, steadily adhered to without modification for more than fifty years, really more than one hundred years, that in the computation of time the day on which the act is done must be included, and when the computation is to be made from the day itself that day must be excluded. Under this rule the words of the alleged amendment, "from and after," the first day of June, 1914, exclude the day named, namely, the first day of June. In support of these contentions the following statutes, and the following decisions of the Court of Appeals of Kentucky, and of this Court, are cited:

General Statutes of Kentucky, Ch. 56, Sec. 7, appendix A;
Kentucky Statutes, Ch. 32, Sec. 561, appendix B;
Bateman v. Megowan, 1 Met. 533;
Chiles v. Smith, 13 Ben. Mon. 461;
Commonwealth v. Shelton, 99 Ky. 120;
Combs v. Eversole, 114 Ky. 225;
Cooperage Co. v. Brown, 124 Ky. 16;
Frankfort v. Farmers Bank, 105 Ky. 812;
Handley v. Cunningham, 12 Bush 402;
Irvin v. Irvin, 105 Ky. 637;
Long v. Hughes, 1st Duvall, 387;
Mallory v. Hiles, 4 Met. 53;
Mooar v. Cov. Natl. Bank, 80 Ky. 305;
Machine Co. v. Iron Works, 23 Ky. L. R. 2164;
Newton v. Ogden, 126 Ky. 103;
Owen v. Insurance Co., 87 Ky. 573;
Smith v. Lawler & Son, 25 Ky. L. R. 1782;
White v. Crutcher, 1 Bush 472;
Wilson's Admr. v. I. C. R. R., 29 Ky. Rep. 148;
Wood v. Commonwealth, 11 Bush 220;

Ky. Stats., Sec. 453;
Arnold v. United States, 9 Cranch 104;
Sheets v. Shelden's Lessee, 2 Wall. 177;
Best v. Polk, 18 Wall. 112;
Taylor v. Brown, 147 U. S. 640.

The water works of the appellee is not a work of internal improvement, within the meaning of those words under the laws of the United States, or the laws of the State of Kentucky.

5 St. At Large (L. & B.), Ch. XIV., pp. 453, 455;
Benton's Thirty Years' View, Vol. 1, Ch. X.;
McMaster's History of the People of the United States, Vols. III. and IV.;
Collins' History of Kentucky, Vol. 1, pp. 537, 553;
Osborne v. County of Adams, 106 U. S. 181; and same case on petition for rehearing, 109 U. S. 1;
Burlington v. Beasley, 94 U. S. 310;
Blair v. Cuming Co., 111 U. S. 363.

The material part of Sec. 6 of Chap. 56, Gen. Stats., is in the following language:

ARGUMENT.

The *ex parte* articles of incorporation were adopted pursuant to Chapter 56 of the General Statutes of Kentucky, adopted in 1873. The seventh section of that chapter provides in part as follows:

"Corporations for the construction of any work of internal improvement may be formed to endure for fifty years; *those formed for other purposes shall not exceed twenty-five years in duration;* * * *" (See Appendix A.)

A private corporation formed for performing the extra municipal service of supplying water to a municipality and its inhabitants, is not a work of internal improvement in Kentucky, and this corporation falls necessarily within the latter class of those whose corporate life "shall not *exceed* twenty-five years in duration."

Section 6 of appellee's charter is as follows:

"The time of commencement of the said corporation *is the first day of June in the year one thousand eight hundred and eighty-nine* and it shall terminate twenty-five years thereafter, subject to such extension of its term of existence as by law provided." (Transcript of the Record, p. 13.)

It is contended for appellant that in computing the time of the duration of the corporation according to the plain terms of the above section of its charter, the *first day of June,* 1889, must be included. And when this express language of the seventh section is considered plainly limiting the duration of the corporation to twenty-five years, there seems to be no doubt but that the first day of June, 1889, should be included, and that, therefore, the life of the corporation expired May 31, 1914.

An ineffectual attempt was made to extend the life of the corporation, not under the provisions of Chapter 56 of the General Statutes of 1873, but pursuant to Sections 559 and 574 of Chapter 32 of the Kentucky Stat-

utes of 1893, being parts of the General Corporation law passed April 5, 1893. These sections are as follows:

> "Sec. 559. Any corporation may, by the consent in writing of the owners of at least two-thirds of its capital stock, change or amend any of the articles of its incorporation, and such alteration or amendment shall be signed and acknowledged by the directors or a majority of them, and filed and recorded as articles of incorporation are required to be."
>
> "Sec. 574. The charter or articles of incorporation of any corporation heretofore created or organized under or by the laws of this State may, after such corporation has accepted, as herein provided, the provisions of the constitution, be amended in the manner provided for the amendment of the articles of incorporation of corporations organized under this chapter and the laws relating to such corporations."

(A previous section, 570, prohibited the passage of any law for the benefit of any corporation unless it first accepted the present constitution.) (Appendix B.)

On the 6th day of May, 1914, a paper purporting to amend Section six (6) of its charter was acknowledged and recorded in the office of the Clerk of the Daviess County Court. This so-called amendment purported to extend its life "for the period of twenty-five years *from and after the first day of June,* 1914." (Transcript, p. 14.)

That the words of the amendment, "from and after the *first* day of June, 1914," exclude that day seems too

plain for controversy. Sheets v. Shelden's Lessee, 2 Wall. 177, 190; Best v. Polk, 18 Wall. 112, 119. Both of these cases hold that the words "from" and "from and after" exclude the day named.

It is contended, therefore, that inasmuch as the life of the corporation expired by limitation on the preceding day, May 31, 1914, it had no longer any existence as a corporation, and therefore could only act for the sole purpose of closing up its business as speedily as possible under Section 561 of the Kentucky Statutes, the material part of which is as follows:

"* * *; and when any corporation expires by the terms of the articles of incorporation * * * *it may thereafter continue to act for the purpose of closing up its business, but for no other purpose;* * * *."

The words of the so-called amendment providing that the term of the life of the corporation is extended for the period of twenty-five years *"from and after the first day of June,* 1914," positively excludes the first day of June, 1914, in words as appropriate for the expression of the purpose as could have been employed. It was clearly and obviously the intention that the amendment should take effect on the *second* day of June, 1914, and not before that day.

There is one case, that of Home Building Association v. Bruner, Secretary of State, 134 Ky. 361, 364, decided by the Court of Appeals in 1909, wherein the

power of a corporation to amend its articles for the extension of its life was considered. The controversy arose between the corporation and the Secretary of State. About two years and eight months after the duration of the corporation had expired, it undertook to amend its articles extending its life for another term and tendered the amendment to the Secretary of State for record as required by law in his office. The Secretary demanded the payment of the tax imposed by Section 2147 Ky. Stats., which the corporation refused to pay, and thereupon brought suit to compel the Secretary to record the amendment. The Franklin Circuit Court dismissed the petition and the corporation appealed, and the judgment of the Circuit Court was affirmed. The opinion of the court is copied in full as follows:

"The Home Building Association is a corporation created under Chapter 56, General Statutes 1873, on May 3, 1880, under articles filed in the county clerk's office of Kenton County. By the terms of the articles of incorporation, its corporate life was extended for 25 years, or until May 3, 1905. On January 16, 1908, it filed in the county clerk's office of Kenton County an amendment to its articles of incorporation as directed in writing by more than three-fourths of its stockholders, extending its corporate life for 25 years from May 3, 1905. A certified copy of the amended articles was delivered to the Secretary of State, who refused to record

the amendment, unless the corporation paid into the treasury of the State a tax of one-tenth of one per cent. upon its capital stock. It refused to pay the tax, and thereupon brought this suit against the Secretary of State to obtain a mandatory injunction requiring him to record the amended articles of incorporation. The Secretary of State demurred to the petition. His demurrer was sustained by the court, and, the plaintiff failing to plead further, the petition was dismissed, and the association appeals.

"By Sections 570, 574, Ky. St. 1909, it is in effect provided that any corporation formed before the passage of the present statutes may avail itself of the provisions of the act by filing in the office of the Secretary of State a resolution adopted by its board of directors accepting the provisions of the Constitution of the State, and that the articles of such corporation may be amended in the manner provided for the amendment of the articles of incorporation of corporations organized under the act. Section 559 provides that any corporation may by consent in writing of the owners of at least two-thirds of its capital stock change or amend any of its articles of incorporation. It would follow from these provisions of the statute that the Home Building Association might amend its articles of incorporation in the manner provided by the statute during its life as a corporation. But Section 561 (Section

2147) provides that, when any corporation expires by the terms of its articles of incorporation, it may be thereafter continued to act for the purpose of closing up its business, but for no other purpose. The corporate life of the Home Building Association expired on May 3, 1905. After that date, by the mandate of the statute, it could continue to act for the purpose of closing up its business, but for no other purpose. The proposed amendment was not made until January 16, 1908, or nearly three years after the corporation expired by the terms of the articles of incorporation. When the corporate life of the corporation was ended, there was nothing to extend. Here it was proposed nearly three years after the corporate life of the association had expired to revivify the dead body, and to make that relate back some two years and eight months. In other words, the association for two years and eight months had only existed for the purpose of winding up its business, and, after this length of time, it was proposed to revivify it and make it a live corporation for the two years and eight months during which it had not been such.

"The law gives a certain length of time for the filing of records in this court, and provides that the time may be extended by the court, but under this provision it has uniformly been held that when the time has expired, there is nothing to extend, and that the appeal must be dismissed. Herstein v. Depue, 65 S. W. 805, 23 Ky.

L. R. 1498; Langborn v. Wiley, 120 Ky. 511, 87 S. W. 266, 27 Ky. L. R. 908. So, when the articles of a corporation have expired, it is too late to adopt an amendment extending the life of a corporation; for, the corporation having expired, this is in effect to create a new corporation. No other question is decided.

"Judgment affirmed."

The question decided was that after the corporation had expired it could not amend its articles; that after the corporation ceased to exist it had no power under the statute to amend its articles; that it could only act thereafter for the purpose of winding up its affairs. The precise duration of the corporation was not a question in the case and was not considered or decided and was not necessary to a determination of the question involved, considered and determined. Therefore, no importance is to be attached to the statement of the opinion that the corporation was organized May 3, 1880, and its corporate life was to extend 25 years or until May 3, 1905. It was of no consequence in the consideration of the question before the court whether the corporation expired on May 2, 1905, or May 3, or any other day in May, or in the year 1905.

The expression of the court is merely *obitur dictum* and not binding on the Court of Appeals or elsewhere.

In Carroll v. Carroll's Lessee, 16 Howard 287, this court said:

"* * * this court, and other courts organized under the common law, has never held itself bound by any part of an opinion, in any case, which was not needful to the ascertainment of the right or title in question between the parties. In Cohens v. The State of Virginia, 6 Wheat. 399, this court was much pressed with some portion of its opinion in the case of Marbury v. Madison. And Mr. Chief Justice Marshall said: 'It is a maxim not to be disregarded, that general expressions in every opinion are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit, when the very point is presented. The reason of this maxim is obvious. The question actually before the court is investigated with care, and considered in its full extent; other principles which may serve to illustrate it are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated.' The cases of *Ex parte* Christy, 3 How. 292, and Peck v. Jenness et al., *7 ibid.* 612, are an illustration of the rule, that any opinion given here or elsewhere cannot be relied on as binding authority, unless the case called for its expression."

See also Northern Bank v. Porter Township, 110 U. S. 615.

When the hiatus occurred on the first day of June, 1914, the provisions of Section 561, [illegible]ed, dropped into the breach and became effect[illegible] day of June, and the amendment was th[illegible] from going into operation on the second d[illegible] 1914, or at any time.

The day, or moment even, that Section 561

fect it terminated the right or power of the appellee company to carry on its business as theretofore, and the rights of the public to have its existence terminated attached, on and after the said first day of June, 1914, the corporation was deprived of acting for any other purpose than for closing up its affairs without unnecessary delay.

This must be so, except, indeed, as the water works can be considered to be a work of "Internal Improvement." And it certainly cannot be so considered in view of the legislative history of internal improvements generally in the United States and especially in the State of Kentucky. The legislation of Congress and of Kentucky have never extended the meaning of those words beyond the construction of highways and bridges, railroads and canals, and the improvement of the navigation of the rivers, for the benefit of interstate and internal commerce.

Considering the matter on the plain terms of the charter of the water works company adopted and made effective on June 1, 1889, and the alleged amendment purporting to extend its life "from and after" the first day of June, 1914, the question seems free from doubt.

And when we consider the rules of interpretation for determining the time when statutes and contracts begin and end, early adopted as adhered to down to the present time, so that the rule has become a fixed rule in the

jurisprudence of the State of Kentucky, the case is made if possible clearer still.

The first case on this subject is that of Chiles v. Smith's Heirs, 13 Ben. Mon. 461 (decided in 1852). The opinion of the Court of Appeals in the case delivered by Judge Simpson is as follows:

> "The final decree in this case was rendered on the 18th day of October, 1848, and the writ of error was sued out on the 18th day of October, 1851. The defendants have pleaded the statute of limitations, which provides that no writ of error shall be sued out 'except in three years next after the judgment or final decree, and not thereafter.' (2 Stat. Law, 1146.)
>
> "If the day in which the decree is rendered is to be included in the computation of the time, then the three years had expired on the 17th of October, 1851, and the bar was complete when the writ of error was sued out.
>
> "(1) The rule in regard to the computation of time seems to be, that when the computation is to be made from an act done, the day in which the act was done must be included, because, since there is no fraction in a day, the act relates to the first moment of the day in which it was done. But when the computation is to be from the day itself, and not from the act done, then the day in which the act was done must be excluded. (Bellaris v. Hester, 1 Lord Raymond, and the authorities cited.)
>
> "Hence in the case of King v. Adderly, 2 Doug. 463, which was a proceeding against a sheriff for failing to return a writ that had been placed in his hands, and which proceeding was not allowed by the statute unless it was commenced against the sheriff within six months after the expiration of his office, it was decided that the day upon which the

office expired was to be reckoned in, to make up the six months, and that the proceeding had been commenced one day too late.

"The court in that case referred to the case of Norris v. Hundred of Gentris, reported in 1 Brownl. 156, which was an action on the statute of hue and cry. The robbery was laid and proved to have been on the 9th day of October, in the thirteenth year of James I., and the writ was tested on the 9th day of October in the following year, and the words of the statute of Elizabeth being, 'that no person shall take any benefit, etc., except he or they so robbed shall commence his or their suit or action within one year next after such robbery,' etc., it was held that the day when the robbery was committed was to be included in the year, and that the action was brought too late.

"Upon the same principle it was decided by this court, in the case of Woods v. Patrick and Wife, Hardin, 457, that in calculating the thirty days which were required by the statute to intervene between the lodging of the order and the commencement of the next term, to entitle the party to a change of venue, the day of depositing the order should be included. So, where process is required to be served a certain number of days before the term, the day on which the process was executed is reckoned as one of the days in the computation of the time.

"(2) The same principle governs all of these cases; the day on which the act was done having in each of them been included in the computation of the time, inasmuch as it was from the act done that the computation had to be made. So, in this case, the language of the statute being, 'that no writ of error shall be sued out, except in three years next after the judgment or final decree,' the day upon which the decree (being the act done) was rendered must be included, and regarded as the first day of

the three years, and, consequently, the limitation had expired on the day preceding the one on which the writ of error was sued out. If the language of the statute had been that no writ of error should be sued out except in three years next after the day on which the judgment or decree was rendered, then, as the computation would have been made from the day itself, and not from the act done, the day on which the decree was rendered would have been excluded.

"A case might occur where a writ of error could be prosecuted on the day a judgment was recovered. If the party could obtain a transcript of the record, and the term had ended, on the day the judgment was recovered, he might sue out his writ of error on the same day, and if that day should not be regarded as constituting a part of the time limited, the consequence would be, that instead of three years, he would be allowed three years and one day in which he could prosecute a writ of error.

"In the case of Smith v. Cassity, 9 B. Mon. 192, it was decided, that the day on which the decree was rendered ought to he excluded upon the principle which was regarded as universal in its application, that in the computation of time, one day should be excluded, and one included, and it was taken for granted that the first day being the day in which the decree was rendered, should be excluded. The question was, however, decided in that case without much consideration, and without any examination of the authorities upon the subject, and we are satisfied upon further consideration, and a reference to the authorities, that the decision was incorrect in the application of the principle therein referred to, whereby the day on which the decree was rendered was excluded instead of having been included in the computation of the time in which the writ of error could be prosecuted.

"The limitation in this case was complete when

the writ was sued out, and the plea must be sustained.

"Wherefore the writ of error is barred."

The next case is that of Batman v. Megowan, 1 Met. 533 (1858). The opinion was delivered by Chief Justice Simpson and contains an elaborate discussion of the rule and cites many cases, including Chiles v. Smith's Heirs, *supra,* and affirms the rule as therein stated. See pp. 544 to 549.

In Mallory v. Hiles, 4 Met. 53 (1862), Bullitt, Judge, the rule is adhered to and affirmed, citing the two preceding cases, and Arnold v. United States, 9 Cranch 104.

And each of the following cases cite Chiles v. Smith's Heirs, *supra,* and affirm the rule:

Long v. Hughes, 1 Duvall 387 (1864);
White v. Crutcher, 1 Bush 472 (1866);
Wood v. Commonwealth, 11 Bush 220 (1875);
Handley v. Cunningham, 12 Bush 402 (1876);
Mooar v. Cov. Natl. Bank, 80 Ky. 305 (1882);
Owen v. Howard Ins. Co., 87 Ky. 572 (1888);
Commonwealth v. Shelton, 99 Ky. 120 (1896);
Irvin v. Irvin, 105 Ky. 637 (1899);
Frankfort v. Farmers Bank, Ibid 812 (1899);
Combs v. Eversole, 114 Ky. 225 (1902);
Machine Co. v. Iron Works, 23 Ky. L. R. 2164 (1902);
Smith v. Lawler & Son, 25 Ky. L. R. 1782 (1904);
Cooperage Co. v. Brown, 124 Ky. 16 (1906);
Newton v. Ogden, 126 Ky. 103 (1907);
Wilson's Admr. v. I. C. R. R. Co., 29 Ky. L. R. 148 (1909).

In all the foregoing cases the rule is repeated over and over in a variety of states of fact to be the rule in Kentucky that where the computation of time is to be made from an act done, the day on which it was done must be included. But when the computation is to be made from the day itself, then the day is excluded.

And we have a statute in Kentucky enacted in 1851, or prior thereto, which has been continuously in force since that time, and now embraced in the Kentucky Statutes as Section 453, relative to the computation of time, which is as follows:

> "Sec. 453. If a statute require a notice to be given, or any other act to be done a certain time before any motion or proceeding, there must be that time, exclusive of the day for such motion or proceeding; but the day on which such notice is given, or such act is done, may be counted as one day and part of the time."

Several of these Kentucky cases cite Arnold v. U. S., 9. Cranch 104, and quote the language of Justice Story: That "it is a general rule that where the computation is to be made from an act done, the day on which the act is done is to be included." And see also Taylor v. Brown, 147 U. S. 640.

These Kentucky cases are cited not alone to support the contention that the day the act of going into effect, of becoming a living, corporate body, June 1, 1889, should be included in computing the twenty-five years

it was allowed to exist as a corporation under the statute, but, also, as authority for the contention that the words "from and after," contained in the alleged amendment, exclude Monday the first day of June, 1914.

And in Sheets v. Selden's Lesee, 2 Wall. 177, 190, and Best v. Polk, 18 Wall. 112, 119, it was held that *from* or *after* a day named excluded that day.

Internal improvement has played a large and conspicuous part in the political and legislative history of the United States. It would extend this brief beyond reasonable limits to undertake even a brief compendium of the legislation relative to the internal improvements, and the vast sums expended and enormous donations of public lands for the construction of canals, roads, turnpike and macadam, bridges, construction of canals, and the improvement of the navigation of rivers, not to mention the improvement of the harbors, having for their object the promotion of commerce between the states, the transportation of the mails, and movement of troops and munitions of war. It would be a laborious task to hunt through the great number of the Acts of Congress for a definition of the phrase, internal improvements. However, in one act passed September 4, 1841, donating proceeds from the sales of public lands lying in the States of Ohio, Indiana, Illinois, Alabama, Missouri, Mississippi, Louisiana, Arkansas and Michigan, and donating 500,000 acres of public land in each of those

States respectively for such improvements; in the ninth section such improvements are defined to be "Roads, railways, bridges, canals, and improvements of water courses and draining swamps," and that "such roads, railways, canals, bridges and water-courses when made or improved shall be free for the transportation of the United States mails and munitions of war, and for the passage of their troops without the payment of any toll whatever." 5 St. Large (L. & B.,) Ch. XIV., page 453, 455. A history of the internal improvements projected and carried out by the Congress beginning with the organization of the government down to 1858, may be found in Benton's Thirty Years View, Vol. 1, Ch. X. The government had in view the promotion of interstate commerce, the carrying of the mails and the transportation of munitions of war and passage of troops. The Synoptical Index to the Statutes at Large (L. & B.) show that about a thousand acts were passed for such improvements, making large donations of land and appropriating great sums of money for this purpose. The Ohio & Chesapeake Canal cost over a million, and the Cumberland road over $6,000,000. McMaster's History of the People of the United States, Vols. III. and IV.

While the United States were engaged in extensive works of this character the States were not inactive. Kentucky, immediately after her admission into the Union in 1792, commenced a general system of turnpike

and macadam roads. Many acts of the legislature were passed for the construction of such roads by corporations, the State taking a part of the stock, commencing in 1793, and continuing down to recent years. The pikes in which the State owned the whole or part of the stock were within the past ten or fifteen years taken over by the counties in which they were located. Appropriations of money were made by the legislature commencing in 1821 for road construction. The first macadam road was authorized in 1826-7, from Maysville to Louisville through Paris, Lexington and Frankfort. In 1821, a road was authorized from Lexington to Nashville. From this time macadam roads were built throughout the central and northern and southern parts of the State, and also bridges over the rivers and streams. By November, 1837, individuals had contributed about $2,000,000 and the State about $2,500,000 towards the construction of these highways.

Commencing in 1801, with an appropriation of $10,000 for improvement of the navigation of the rivers of the State, appropriations were continued to some time until after the Civil War. Several millions were expended in such work, clearing the channels, and building locks and dams on Green River, Barren River, Licking River, Kentucky River, Rough River, Big Sandy River and others, all of which about 1875 to 1885 were ceded to the United States.

The State commenced in 1825 the construction of the Louisville and Portland Canal around the Falls of the Ohio at Louisville and expended over a million dollars down to the time the United States took control of it. Collins' History of Kentucky, Vol. I., pp. 537, 553.

This very brief and imperfect epitome of the history of Internal Improvements in Kentucky is referred to for the purpose of showing what must have been in the minds of the legislature when it passed Chapter 56 in 1873, of the General Statutes of Kentucky.

In view of the legislative interpretation of Internal Improvements, as shown by the action of the State, running through a period of eighty years, for the promotion of internal commerce, amongst her own people, it cannot be supposed that the legislature, in enacting the General Statutes of 1873, could have contemplated that a water works for supplying a municipality with water, an extra municipal service, for private gain, constituted a work of internal improvement.

It is therefore respectfully submitted that in view of the legislative interpretation of the phrase, Internal Improvements, as shown by the action of Congress of the United States, and the legislation of the State of Kentucky, that the works of the appellee cannot be included, and this being true the appellee's charter of 1889 could *"not exceed twenty-five years in duration."*

There are three cases decided by this court in which the subject of internal improvement was considered.

Osborne v. County of Adams, 106 U. S. 181, was a suit on coupons of bonds issued on behalf of Juniata Precinct of the county of Adams, pursuant to vote of the precinct, to aid in the construction of a steam grist-mill therein, under an act of the legislature of the State of Nebraska, approved February 15, 1869, authorizing any county or city in that State "to issue bonds to aid in the construction of any railroad or other work of internal improvement," etc., on popular vote, etc. A demurrer was sustained to the declaration by the Circuit Court and Osborne brought writ of error. This court held that a steam grist-mill was not a work of internal improvement within the meaning of the act. The court differentiated the case from that of Burlington v. Beasley, 94 U. S. 310, which "arose under a statute of Kansas which empowered municipal townships in that State to issue bonds 'for the purpose of building bridges, free or otherwise, to aid in the construction of railroads or water-power, by donation thereto, or the taking of stock therein, or for other works of internal improvement.' The bonds in suit in that case were issued to aid in the construction and completion of, and to furnish the motive power for, a steam custom grist-mill. It was held that the Kansas statute, reasonably interpreted, embraced a grist-mill operated by steam as well as one run

by water power; that since the municipal aid was authorized for 'the construction of * * * water-power,' the phrase 'other works of internal improvement' in the Kansas statute, might be fairly construed as embracing works of the same class, and consequently as embracing a steam grist-mill. The court was somewhat influenced, as plainly appears from its opinion, by decisions of the Supreme Court of Kansas, particularly that of Commissioners of Leavenworth County v. Miller, 7 Kansas 479."

"The present case" (say the court) "is different. The only work of internal improvement specifically described in the Nebraska statute is a railroad, and we are not justified by anything in Burlington v. Beasley, or in the decisions of the courts of Nebraska, in holding that a steam or other kind of grist-mill is of the class of internal improvements which municipal townships in that State are empowered, by the statute in question, to aid by an issue of bonds." The court held the bonds unauthorized.

A petition for a rehearing was filed and denied. The court quotes from an opinion of the Supreme Court of Nebraska holding that there "is a clear distinction between aiding the development of the water-power of the State—a power that is continuing in its nature and may be used without cost or expense, and must be used at certain points on a stream where a dam can be erected

and power obtained—and a mill propelled by steam, that must be attended with a continuous cost for fuel, and may at any time be moved to another locality." The court say this case supports their formed opinion. 109 U. S. 1.

An interesting and instructive case on the subject of Internal Improvements is that of Blair v. Cuming County, 111 U. S. 363, 373. This case seems to have involved a construction of the same Act considered in Osborne v. County of Adams, *supra*. The action was brought to recover the money due on coupons cut from certain bonds issued by the county of Cuming for and on behalf of the West Point Precinct of that county. The circuit court below sustained a general demurrer to the petition, and the case was brought into this court on a writ of error.

The bonds, from which the coupons sued on were cut, were issued to aid the West Point Manufacturing Company in improving the water-power of the Elkhorn River, for the purpose of propelling public grist-mills and other works of internal improvement of a public nature in said West Point Precinct. In the course of the opinion of the court (on pp. 368, 369), it is said:

> "It is also objected that the bonds state that they are issued under the act of 1869, to aid the company in improving the water-power of the river for the purpose of propelling public grist-mills 'and other works of internal improvement of a public

nature' in the precinct; and that the latter part of the statement is indefinite, and the other works to be aided or improved, or propelled, should be described or identified, so that it may be seen they were works of internal improvement, within the statute, and also because the proposition voted on must, in order to be a lawful one, have stated what the specific 'other works' were. It is a sufficient answer to this objection to say, that the petition states, and the demurrer admits, that the only work of internal improvement of a public nature for which the bonds were issued to the company, was the improvement of the water-power of the Elkhorn River for the purpose of propelling public grist-mills in the precinct; that the improvement of such water-power for that purpose rendered it available and useful for propelling other works of internal improvement of a public nature, which were or thereafter might be constructed and located on that river in that precinct; that the improvement of the water-power of that river, to aid which the bonds were issued and negotiated, consisted in constructing a canal for water-power purposes in the precinct; and that the bonds and their attached coupons were issued and negotiated under and by virtue of a majority vote of the qualified voters of the precinct, and in pursuance of the Act. Thus, there is a distinct statement as well as an admission, that no work of internal improvement was covered by the vote or the issue of the bonds, other than the one of improving such water-power for the purpose of propelling public grist-mills in the precinct."

And further, on page 372:

"As we understand the present case, the thing aided is the improving the water-power of a river, by constructing a canal for water-power purposes to propel public grist-mills. This is within the act

> of 1869. A water grist-mill cannot be run so as to be a public grist-mill unless it be furnished with water-power, and, if an existing river needs to be improved to furnish such power, the improvement of it is a public work of internal improvement."

And in the concluding paragraph on page 373, the court says:

> "And when the legislature has given to grist-mills and the water-power connected with them such a public character as in the present case, the improvement of the water-power must be regarded as a public work of internal improvement, which may be aided in its construction by the issue of bonds under the act in question."

The court reversed the judgment of the circuit court and directed that the demurrer be overruled.

The decision of the court in the Kansas case (Burlington v. Beasley) was rendered in deference to the construction given by the highest court of the State of Kansas to its own statute. But in the case of Osborne v. Adams, the court declined to follow the Beasley case in construing the Nebraska statute, and held a steam grist-mill, disconnected with water-power from a river, was not a work of internal improvement. And in Blair v. Cuming County, upheld the bonds because they were issued for the improvement of a river.

The improvement of rivers has always been considered everywhere in this country a work of internal improvement.

The water works of the appellee, in view of these authorities, and the history of internal improvement in this country, and in the State of Kentucky, certainly cannot be considered a work of internal improvement; and therefore the duration of the company's corporate existence was strictly limited to twenty-five years, and no longer, under section 7 of chapter 56 of the General Statutes. And since its corporate existence commenced on and included the first day of June, 1889, it consequently expired on May 31, 1914. And inasmuch as the alleged amendment could only take effect by its own terms, "from and after" the first day of June, 1914, that is, on the 2nd day of June, 1914, sec. 561 of the Kentucky Statutes took effect on the first day of June, 1914, and prevented the alleged amendment from ever becoming operative, or taking effect, at all.

When section 561 took effect on the said first day of June, 1914, all power of the corporation to carry on its business was thereby terminated and it could lawfully do nothing thereafter but close up its business as speedily as possible, as positively required by said section five hundred and sixty-one.

Wherefore, the appellant humbly prays this Honorable Court for a reversal of the decree of the District Court.

GEORGE W. JOLLY,
Attorney for Appellant.

JOHN A. DEAN, JR.,
BEN D. RINGO,
LAVEGA CLEMENTS,
Of Counsel.

APPENDIX A.

General Statutes of Kentucky, enacted by the legislature April 22, 1873, Chap. 56.

"Sec. 6. The corporation may commence business as soon as the articles are filed for record in the office of the county court clerk, and their acts shall be valid if the publication in a newspaper is made, and the copy filed in the office of the Secretary of State, when such filing is necessary, within three months from such filing in the clerk's office. No change in any of the foregoing particulars shall be valid, unless recorded and published as the original articles are required to be; nor shall any change be made at any time or in any manner, which would be inconsistent with the provisions of this act."

"Sec. 7. Corporations for the construction of any work of internal improvement may be formed to endure for fifty years; those formed for other purposes shall not exceed twenty-five years in duration; but in either case they may be renewed from time to time for periods not greater than was at first permissible, if three-fourths of the votes cast at any regular election held for that purpose shall be in favor of such renewal. The articles of incorporation shall provide a mode by which a member may, at any time, withdraw from such corporation, and also the mode of determining the amount to be received by such member upon withdrawal, and

for the payment thereof, subject only to the rights of creditors of the corporation."

APPENDIX B.

The following sections of the Kentucky Statutes referred to in the foregoing brief are as follows:

"Sec. 559. Any corporation may, by the consent in writing of the owners of at least two-thirds of its capital stock, change or amend any of the articles of its incorporation, and such alteration or amendment shall be signed and acknowledged by the directors, or a majority of them, and filed and recorded as articles of incorporation are required to be." (See Sec. 574.)

"Sec. 561. Any corporation organized under this chapter may, by the consent in writing of the owners of the majority of its shares of stock, unless otherwise provided in the articles of incorporation or amendments thereto, close its business and wind up its affairs; *and when any corporation expires by the terms of the articles of incorporation,* or by the voluntary act of its stockholders, *it may thereafter continue to act for the purpose of closing up its business, but for no other purpose; and it shall be the duty of the officers to settle up its affairs and business as speedily as possible;* and they shall cause notice to be published, for at least once a week for four consecutive weeks, in some newspaper printed and published in the county, if any, of the fact that it is closing up its business; and all debts and demands

against the corporation shall be paid in full before the officers receive anything."

"Sec. 570. No law shall be passed for the benefit of, or in the interest of, any corporation heretofore created or organized by or under the laws of this State or any other State; nor shall any corporation avail itself of the provisions of this chapter, unless such corporation shall have previously, by a resolution adopted by its board of directors and filed in the office of the Secretary of this State, accepted the provisions of the Constitution of this State; and such resolution, or a certified copy thereof, shall be evidence for and against such corporation."

"Sec. 574. The charter or articles of incorporation of any corporation heretofore created or organized under or by the laws of this State may, after such corporation has accepted, as herein provided, the provisions of the Constitution, be amended in the manner provided for the amendment of the articles of incorporation of corporations organized under this chapter and the laws relating to such corporations." (See Sec. 559.)

"Sec. 273. All general laws relating to the matters treated of in this chapter shall stand repealed when this act takes effect; and it appearing that necessary amendments to many existing charters cannot now be obtained, and that many necessary corporations cannot, until this act takes effect, be organized, and that the interest of corporations and persons doing business with

them required it, it is enacted that this act shall take effect from and after its passage." Took effect April 5, 1893. Acts 1891, 2, 3, page 734.

CONSTITUTIONAL PROVISIONS.

"Sec. 164. No county, city, town, taxing district or other municipality shall be authorized or permitted to grant any franchise or privilege, or make any contract in reference thereto, for a term exceeding twenty years. Before granting such franchise or privilege for a term of years, such municipality shall first, after due advertisement, receive bids therefor publicly, and award the same to the highest and best bidder; but it shall have the right to reject any or all bids. This section shall not apply to a trunk railway."

"Sec. 190. No corporation in existence at the time of the adoption of this Constitution shall have the benefit of future legislation without first filing in the office of the Secretary of State an acceptance of the provisions of this Constitution."

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No. 3[redacted]79

Supreme Court of the United States

City of Owensboro, Kentucky, - - Appellant,

Vs.

Owensboro Water Works Company, Appellee.

BRIEF FOR APPELLANT.

JOHN A. DEAN, JR.,
BEN D. RINGO,
LAVEGA CLEMENTS,
Attorneys for Appellant,
City of Owensboro.

Messenger Job Printing Co., Owensboro, Ky.

Supreme Court of the United States

City of Owensboro, - - - - - - Appellant,

Vs.

Owensboro Water Works Company, Appellee.

QUESTIONS INVOLVED.

The only question to be determined upon this appeal is the correctness of the Court's judgment entered herein on January 6, 1915, and found on pages 118-119 of the printed record. The court's opinion, which appellant contends puts a wrong construction upon the course of dealing between the parties to this litigation, will be found on pages 111-118 of printed record.

The contract between the parties hereto evidenced by the several ordinances and their acceptance by appellee, expired by limitation on June 1, 1914.

With the expiration of this contract the right of appellee to further use the streets and public ways of the City ceased. This right was derived by appellee by virtue of having been substituted to the rights of the Owensboro Water Company by the ordinance of June 3, 1889, (printed record page 15-17).

This ordinance did not confer upon appellee any rights to the use of streets and public ways beyond the period of existence of the Owensboro Water Company. It was not a contract granting any easement or franchise to the appellee, but only an assent on the part

of the City to the substitution of the appellee as the other contracting party under the old contracts theretofore had with the Owensboro Water Company.

This is the proper construction of the language used in this ordinance, and is the construction placed thereon by appellant and appellee. The parties to this contract will be bound by this construction so placed upon it and mutually acted upon.

City of Chicago vs. Sheldon, 76 U. S., 56; 19 L. Ed., 296.

Page on Contracts, Sections 1112 et seq.

The rights granted to appellee are limited to those which flow from a just and fair interpretation of the contract; and this will be construed most strongly against the Water Company and in favor of the public.

Joy vs. City of St. Louis, 138 U. S. 1; 34 L. Ed., 843.

Louisville Trust Co. vs. City of Cincinnati, 76 Fed Rep., 296.

The appellee is estopped by its various contracts and by the records of its dealing and litigation with the appellant, to claim a perpetual franchise, or to claim otherwise than that the situation of the parties under their contract is as set out in its several pleadings in other causes which are filed in this record. The appellant having acted upon the construction thus placed upon the contract by the appellee, and built a water works system of its own to be used at and after the expiration of appellee's grant, thus acting upon the construction given to the contract, the appellee is estopped to contend for a different construction thereof.

Supreme Court of the United States

City of Owensboro, Kentucky, - - Appellant,

Vs. BRIEF FOR APPELLANT.

Owensboro Water Works Company, Appellee.

THE FACTS.

The appellant, City of Owensboro, Kentucky, is a city of the third class organized under the general municipal corporation laws of the State of Kentucky, with a population of about twenty thousand.

The appellee, Owensboro Water Works Company, is a private corporation, first organized under the general corporation laws of the State of Kentucky on the 30th day of May, 1889. Its Articles of Incorporation, or Charter, will be found on pages 12 and 13 of the printed record.

Under the laws in force in Kentucky at that time governing the organization of private corporations, it was mandatory that the charter fix the time of the commencement of the corporation and the period of its corporate existence. In conformity with this law Section 6 of the Articles provides that the corporate existence of this company should begin on the 1st day of June, 1889, and terminate twenty-five years thereafter, subject to such extensions of its term of existence as by law provided. (Printed record page 13).

Afterward on May 6, 1914, these Articles of Incorporation were amended, as will appear on page 14 of the printed record, and by

this amendment the period of its existence was extended for twenty-five years from and after the first day of June, 1914.

Some time prior to September 10, 1878, there was organized under the laws of the State of Kentucky, a corporation known as the Owensboro Water Company. On September 10, 1878, the Mayor and City Council of Owensboro passed an ordinance (pages 41-45 printed record) granting to the last named Company and its successors and assigns for the duration of said Company the privilege to construct and operate water works in the City of Owensboro.

The duration of said Company was fixed by its charter at a period of twenty-five years from and after September 9th, 1878, as appears from numerous exhibits in the record, among them the statement of the appellee herein in its bill in equity against the City of Owensboro on page 59 of the printed record.

Said ordinance of September 10, 1878, in section 13 thereof, provides for the expiration of said franchise or privilege at the end of twenty-five years from the passage of that ordinance. (Printed record pages 21-30). There was no provision of law at that time, and there is no provision in this ordinance, for extending the period of this grant. This grant expired by limitation on the 9th day of September, 1903.

By certain dealings between the Owensboro Water Company, the old corporation, and the Owensboro Water Works Company, the newer corporation, the latter negotiated to purchase all the property, tangible and intangible, of the older company. In order to consummate this sale and purchase it was necessary to get the permission of the City. On June 3, 1889, an ordinance was passed by the City of Owensboro (exhibit No. 3, page 15 printed record) by the terms whereof franchise and license were granted to the Owensboro Water Works Company.

It is under the terms of this ordinance that the appellee, Owensboro Water Works Company, claims its right to the relief it is seeking in this action. The view which the Court shall take concerning the ef-

fect, force and meaning of this ordinance, will determine, as we think, the matters at issue in this action.

After its organization, as above set forth, the Owensboro Water Works Company purchased all the property, including the franchises and contracts of the Owensboro Water Company. This it had the right to do under its charter; and clearly the Owensboro Water Company had full right and authority to sell its property, including its easements and rights to use the streets and alleys of the City for laying pipe and for other purposes. Such a contract of purchase and sale could probably have been made between two contracting parties without securing any assent or agreement thereto on the part of the City of Owensboro. The covenants and undertakings entered into by the Owensboro Water Company according to the terms of the ordinance granting its franchises were no doubt sufficient to protect the rights of the City in every way. At least they were deemed so by the City; for in the subsequent ordinance passed by the Mayor and common council on Monday, June 3, 1889, no provision whatever was made for protecting the rights of the City in any way. In order that the Court may get our contention at this point we quote here section 13 from the ordinance of September 10, 1878, which is as follows:

> "Sec. 13: In consideration of the benefits which will be derived by the said City and its inhabitants by the construction and operation of said water works and in further consideration of the risk of so large an investment by said company in said city in a new and untried enterprise, the right, privileges and franchises hereby granted to and vested in said company shall remain in force and effect for twenty-five years from the passage of this ordinance, and the said company shall be exempt from the payment of all taxes which shall be assessed or levied for the use or benefit of the said city for two years from the passage of this ordinance; and the said city hereby rents of the said company for the uses hereinbefore set out one fire hydrant at each intersection of streets along the lines of pipe hereinbefore mentioned, in all sixty-two hydrants, for and during the term of twenty-five years from the passage of this ordinance, and agrees and binds

itself to pay therefor to said company as follows, to-wit: For the first fifty hydrants at the rate of seventy-five dollars each per year, and for all hydrants in excess of the first fifty at the rate of fifty dollars each per year, beginning as soon as the said work shall be put into sucessful operation; which sums shall be paid by said City to said company quarter yearly on the first days of January, April, July and October of each year and every year during the existence of said contract; and if any extension and extensions of pipe shall be made by said Company during the said term of twenty-five years at the instance or request of said City, the said City hereby agrees and binds itself to take on the line and lines of such extensions one hydrant, as soon as completed at each intersection of streets along the whole length of such extension and extensions, and to pay therefor for the unexpired term of said franchises at the rate of fifty dollars each per year, payable quarter yearly at the same time as hereinbefore stipulated for the first sixty-two hydrants. But the said City shall have the right to have substituted for any two of said first sixty-two hydrants drinking fountains for man and beast, to be regulated by spring or self-closing valves connected with the supply pipes, paying therefor the same compensation as is hereby fixed for hydrants. (Printed record, page 44).

It will thus appear to the Court that the duration of the rights, privileges and franchises granted by that ordinance was limited to a period of twenty-five years from and after its passage. There can be no doubt, we suppose, that when the Water Company accepted this ordinance the ordinace then evidenced a binding contract between the two parties according to its terms; so that all rights acquired under it ceased on September 10, 1903.

The ordinance of June 3, 1889, under which appellee is claiming reads as follows:

"Whereas the Owensboro Water Works Company, of Owensboro, Kentucky, a corporation duly organized and existing under the laws of the State of Kentucky, is ready to purchase the water works of the Owensboro Water Company, together with its existing contracts for supplying the City of Owensboro and the inhabitants of said City and its vicinity with water, and whereas it is desired by the said two companies in order that the

said purchase may be consummated, that the City of Owensboro grant to the said The Owensboro Water Works Company, of Owensboro, Kentucky, the franchises and license to maintain, complete and operate water works in the City of Owensboro, Kentucky, and to use the streets, alleys and other public highways within the said city for laying, repairing and taking up mains, service pipes, hydrants and other apparatus for the supply of water, and that the City of Owensboro accept the said The Owensboro Water Works Company, of Owensboro, Kentucky, as the successor to the contract made by the City of Owensboro with the Owensboro Water Company for hydrant rentals; now in order to enable the said companies to carry out their negotiations, and to vest the contracts of the Owensboro Water Company for hydrants as fully in the said The Owensboro Water Works Company, of Owensboro, Kentucky, as if they had been originally made by the City of Owensboro, with the said The Owensboro Water Works Company, of Owensboro, Kentucky.

Be it ordained by the Common Council of the City of Owensboro:

Sec. 1. That in consideration of the purchase by the Owensboro Water Works Company, of Owensboro, Kentucky, of the water works of the Owensboro Water Company, the franchise and license are hereby granted to the Owensboro Water Works Company, of Owensboro, Kentucky, and to its successors and assigns, for and during the existence of the said corporation, to maintain, complete and operate water works in the City of Owensboro for supplying the City of Owensboro and the inhabitants of said City and its vicinity with water for public and private purposes, and to use within the present and future limits of the City of Owensboro, the streets, alleys and other public highways thereof, for the purpose of laying, repairing and taking up mains, service pipes, hydrants and other apparatus for the supply of water.

But there shall be no continued unreasonable obstruction of the said streets, alleys and other public highways, and after their use from time to time, they shall be restored by the said water works company as near as practicable to their former condition; and the said grant is subject to the existing right of purpose of the said water works by the said City of Owensboro.

Sec. 2. That, in like consideration of the said purchase, by the Owensboro Water Works Company, of Owensboro, Kentucky, of the water works of the Owensboro Water Company,

the City of Owensboro hereby accepts the said The Owensboro Water Works Company, of Owensboro, Kentucky, as the successor to the contract for hydrant rental now existing between the City of Owensboro and the Owensboro Water Company as fully as if such existing contracts had been originally made by the City of Owensboro with the said The Owensboro Water Works Company, of Owensboro, Kentucky, without the intervention of the said Owensboro Water Company.

Sec. 3. That the consent of the City of Owensboro is hereby given to the consummation of the said purchase of the said water works of the Owensboro Water Company by the Owensboro Water Works Company, of Owensboro, Kentucky, and upon such consummation the Mayor and City Clerk of the City of Owensboro are hereby authorized and instructed to seal duplicate copies of the ordinance with the seal of the City of Owensboro, and to sign such copies as a contract between the City of Owensboro and the Owensboro Water Works Company, of Owensboro, Kentucky, and to deliver one of such copies so signed and sealed to the Owensboro Water Works Company, of Owensboro, Kentucky, and to accept the other in behalf of the City of Owensboro, when signed and sealed by the said The Owensboro Water Works Company, of Owensboro, Kentucky.

Sec. 4. This ordinance shall take effect at its passage and publication."

(Printed record pages 15-17).

Conceiving that the franchise of appellee had expired by limitation the City passed the ordinance denying to appellee any further right to use the streets. This suit was thereupon instituted by appellee to enjoin the City from interfering with these rights claimed by appellee. The United States District Court for the Western District of Kentucky gave judgment for the complainant (appellee) and this appeal was taken by defendant City. (Printed record page 118.)

It will be observed that the preamble to the ordinance of June 3, 1889, sets out fully the purpose of its passage. It is there set forth that the Owensboro Water Works Company desired to purchase the plant of the Owensboro Water Company "together with its existing contracts for supplying the City of Owensboro and the inhabitants of said City and its vicinity with water"; and in order that the sale and

purchase of the property of the Owensboro Water Company might be consummated between the two contracting parties, it is set forth that these two corporations desired "that the City of Owensboro grant to the said The Owensboro Water Works Company, of Owensboro, Kentucky, THE franchises and license to maintain, COMPLETE and operate water works in the City of Owensboro and use the streets, alleys and other public highways within the said City for laying, repairing and taking up mains, service pipes, hydrants and other apparatus for the supply of water, and that the City of Owensboro accept the said The Owensboro Water Works Company, of Owensboro, Kentucky, as a successor to the contract made by the City of Owensboro with the Owensboro Water Company for hydrant rental." It is then stated "in order to enable the said companies to carry out their negotiations," and to vest the contracts for hydrants, etc., in the Owensboro Water Works Company, the ordinance was passed and approved.

This ordinance does not set forth or indicate any consideration or inducement whatever flowing to the City of Owensboro as consideration for its passage. The consideration named in the ordinance is said to be "the purchase by the Owensboro Water Works Company, of Owensboro, Kentucky, of the water works of the Owensboro Water Company." Of course, this was not any consideration flowing to the City; and, as we think, this ordinance was never anything more than a mere assent on the part of the City to the contract of purchase and sale of all the property of the Owensboro Water Company by the Owensboro Water Works Company.

Certainly there is nothing in the ordinance itself to indicate that either party to the contract thereby tendered to and afterward accepted by the Owensboro Water Works Company considered or understood this to be an ordinance granting any new franchise or in any wise extending or enlarging the rights of the Owensboro Water Company acquired under the ordinance of September 10, 1878.

By the plain words of the first section of this ordinance, it is pro-

vided that "THE franchises and license are hereby granted to the Owensboro Water Works Company of Owensboro, Kentucky, and to its successors and assigns for and during the existence of the said corporation to maintain, complete and operate water works in the City of Owensboro, etc."

Manifestly the words "during the existence of the said corporation" refers to the existence of the Owensboro Water Company mentioned in the same sentence. At the close of the second paragraph of Section One of this ordinance these words occur, "and the said grant is subject to the existing right of purchase of the said water works by the said City of Owensboro." This must and evidently does refer to the right retained by the ordinance of 1878—and by clearest implication this ordinance giving assent to the contract between the two water companies was not designed or intended or understood to in any wise extend or enlarge the rights granted by the former ordinance. Section Two accepts the Owensboro Water Works Company as the successor in the contract for hydrant rental to the Owensboro Water Company and the third and last section sets forth fully the consent of the City to the consummation of the purchase and sale of the property of the Owensboro Water Company to the Owensboro Water Works Company.

Certainly the Court will read this entire ordinance, including its preamble, and from the whole of it will ascertain and determine the meaning to be given to the contract between the parties.

THE APPELLANT'S CLAIM.

The Owensboro Water Company entered into a contract with the defendant City by an ordinance dated September 10, 1878, the terms of which ordinance were accepted by the said Company. This ordinance is set forth in full in the answer herein. Under and by virtue of the ordinance of 1878 the Owensboro Water Company was granted certain rights, privileges and franchises which were

therein and thereby limited in duration to the period of twenty-five years. The corporate life of the Owensboro Water Company was limited to the same period, and was never extended. Under the charter of the City of Owensboro then in force, the Common Council of the City was vested with full power to regulate and control the use of its streets for the purposes of laying water mains and pipes and other like things therein. There is no claim that the Legislature of Kentucky in any wise granted to either the appellee herein or the Owensboro Water Company any absolute or unrestricted right to use the streets and public ways of the City for such purposes—although perhaps the Legislature could have done so. Such rights as either the Owensboro Water Company or appellee was given in these particulars flowed from the City and not from the State. Hence the controlling thought in the determination of the rights at issue here is embodied in the proper understanding and construction to be given to and placed upon the several ordinances of the City which were accepted by the two water companies and which formed the sole and only basis of the rights asserted by the appellee herein.

The City by its Council and Mayor entered into an elaborate contract with the Owensboro Water Company as set forth in the ordinance of September 10, 1878. We understand it to be conceded that this ordinance and the contracts made under it limited the easement therein granted to the Water Company to use the streets and alleys for laying water pipes, etc., to a period of twenty-five years.

It is apparent from an examination of the record that this is the only contract ever entered into by the City wherein it was contemplated that the City was bargaining away the use of its streets and public ways for water works purposes.

In the making of this contract the City had in mind the benefits to flow to it and its inhabitants from the establishment and maintenance of an adequate water works system for the supplying of water to the City and the public generally. In the execution of that agreement the City by its proper authorities took a survey of that whole question

and brought within the perview of its contract the several reciprocal rights and duties of each party to that important undertaking. This was a clear, distinct and complete contract covering this whole subject and limiting the life of the grants therein made to a period of twenty-five years.

This was the only contract which the City ever undertook to make dealing with this subject, and it is the contention of the City that no such grant was made under the ordinance of 1889 and that under no just and reasonable construction of that ordinance can the claim of the Owensboro Water Works Company be sustained or upheld.

This ordinance is set forth in full in complainant's bill. The appellant contends:

1st: That this was not and is not an ordinance granting to the appellee Owensboro Water Works Company any franchise or easement in the streets or ways of the City of Owensboro.

2nd: That said ordinance does not purport or undertake to grant any other franchise or right to the Owensboro Water Works Company, except only to license it as the successor in contracts to the Owensboro Water Company to come upon the streets and public ways of the City for the purpose of laying, repairing and taking up the mains, pipes, hydrants and other apparatus and to "complete" and operate the water works, plant and system begun by the Owensboro Water Company.

3rd: That the ordinance by its terms only grants the franchise and license for and during the existence of the Owensboro Water Company.

4th: That such was the construction of this ordinance and of the whole matter adopted and acted upon by the parties concerned; and the Court will, as far as consistent with the plain language of the contract, give effect to the construction placed upon it by the parties to it.

5th: That the ordinance of June 3, 1889, amounted to nothing more than a consent on the part of the City to the purchase of the

water plant by the Owensboro Water Works Company and the acceptance of the Water Works Company as the successor to the franchises and contracts theretofore held by the Owensboro Water Company.

6th: That this ordinance of June 3,1889, will be read and construed together with the original ordinance granting the twenty-five year franchise.

7th: That as a matter of law this ordinance will be construed as changing or amending the original contract only for the purposes and to the extent that it make such changes or modifications by its terms.

8th: That the terms of both ordinances will be construed most strictly against the water companies and in favor of the public; and that nothing will pass by implication to the grantee under either of said ordinances, and,

9th: These ordinances will be so construed as to effectuate the intention of the parties thereto; always where doubt or uncertainty exists as to the meaning of terms used or construction to be given to the language of the ordinance all such doubts will be resolved in favor of the City.

We think this case is not governed or controlled by the opinion of this Court either in the case of City of Louisville vs. Cumberland Telephone & Telegraph Company (224 U. S., 649; 56 L. Ed., 934), or in the case of City of Owensboro vs. Cumberland Telephone & Telegraph Company (230 U. S., 59; 57 L. Ed. 1390). It rather falls within the rules and principles announced by the Court in the other cases hereinafter cited dealing with this subject.

In the Louisville-Telephone case Mr. Justice Lamar, in opening the statement of the case, says: "On April 3, 1886, the Legislature of Kentucky chartered the Ohio Valley Telephone Company, fixing no limit to its corporate existence. Afterward the City Council passed an ordinance ratifying the charter granted to the Company by the Legislature and granting to the Telephone Company and its successors and assigns the right to the use of the streets and public ways

of the City—and this without any limitation as to time." As said by the Court in that case:

> "This grant was not at will, nor for years, nor for the life of the City. Neither was it made terminable upon the happening of a future event; but it was a necessary and integral part of the other franchises conferred upon the Company, all of which were perpetual, and none of which could be exercised without this essential right to use the streets."

It is readily conceded by the appellant here that where the grant to a corporation of a franchise or easement in the streets and public ways of a City is not, by its terms, or by some limitation placed upon the authority of the power granting the franchise, limited and made revocable, the grant is in fee. This broad statement of the rule, however, is always coupled with the further thought that, if the language employed in the grants will at all authorize it, the Court will adopt the construction which is in accordance with the understanding of the contracting parties at the time the grant is made. In Page on Contracts, Section 1112 et seq. this familiar rule is stated thus:

> "Since the object of the construction is to ascertain the intention of the parties, the contract must be considered as an entirety. The problem is not what the separate parts of the contract mean, but what the contract means when considered as a whole. The contract must be thus construed even if the separate parts are clear and free from ambiguity. * * *
>
> The contract being construed as a whole, it follows that one part of it may affect the construction of a different part. An illustration of this is found where the contract as a whole shows a given intention, but certain words or phrases, if taken literally, will defeat such an intention. In such case the particular words or phrases will, if possible, be construed in such a way as to be consistent with the general intention. * * * *
>
> Since the contract must be construed as a whole, effect must be given to writings incorporated in the contract by reference. * * * * So an ambiguous reference in a later contract to an earlier one may be explained by the contents of such earlier one. * * * * If the two contracts are not executed at the same time, but refer to the same subject matter and on their face

show that they were executed each as a means of carrying out the same intent as the other, they may be construed together. * * * * So a construction which accords with the public policy is to be preferred to one contrary thereto. If the interest of the public is affected by a contract it should be construed so as to protect such interest. * * * *

If terms of the contract appear on their face to be inserted for the benefit of one of the parties, he will be considered as having inserted such terms and as having chosen the language thereof. Any ambiguity in such language is, therefore, to be construed more strongly against the party making use of such language. * * * * It is a recognized rule of construction that the Court will place itself in the position of the parties who made the contract as nearly as can be done, by admitting evidence of the surrounding facts and circumstances, the nature of the subject matter, the relation of the parties to the contract, and the objects sought to be accomplished by it. * * * * So a City ordinance, if a contract, may be construed in the light of the practicable construction placed thereon by the parties."

No doubt the appellee's right to succeed here, if any it has, will be placed upon the words in Section One of the ordinance of 1889 reading as follows:

"That in consideration of the purchase by the Owensboro Water Works Company, of Owensboro, Kentucky, of the water works of the Owensboro Water Company, the franchise and license are hereby granted to the Owensboro Water Works Company, of Owensboro, Kentucky, and to its successors and assigns, for and during the existence of the said corporation, to maintain, complete and operate water works in the City of Owensboro for supplying the City of Owensboro and the inhabitants of said City and its vicinity with water for public and private purposes, and to use within the present and future limits of the City of Owensboro, the streets, alleys and other public highways thereof for the purpose of laying, repairing and taking up mains, service pipes, hydrants and other apparatus for the supply of water."

This section of the ordinance concludes thus:

"and the said grant is subject to the existing right of purchase of the said water works by the said City of Owensboro."

The appellant contends that by the words, "the franchise and license are hereby granted" the City Council said and intended that this was the franchise and license theretofore granted to the Owensboro Water Company; for manifestly reference was had to the rights theretofore granted to the Owensboro Water Company and to the limitations of the grant of September 10, 1878; both the Water Works Company and the Water Company are referred to in the portion of the sentence immediately preceding the words, "for and during the existence of said corporation," and license is given to maintain, "complete" and operate water works in the City. It will be observed that it is THE franchise and license here referred to—having evident reference to a franchise and license to go forward and complete the construction of the water works as provided for in the former ordinance therein referred to. "The existence of said corporation," as used in this sentence, must leave the mind in doubt as to which corporation is referred to.

Clearly the parties to this contract understood at the time and for many years afterward that this expression had reference to the existence of the Owensboro Water Company. The sentence is clearly susceptible of this meaning and construction; and when the mind of the Court is in doubt concerning such construction, this doubt must be resolved in favor of the public and especially if this conforms to the construction given the contract by the parties themselves.

That both parties to this contract construed it as the appellant is claiming is manifest from all the acts and conduct of the appellee, as set forth in the record herein, up to the time this suit was filed. Many ordinances were passed by the City and accepted by the appellee providing for extensions of water mains, etc., and for the rental on the part of the City of fire hydrants. Some of these are filed with the answer herein and it is stipulated that these copies of the ordinances are correct and that such ordinances were passed and accepted. Among these is the ordinace of November 7, 1892, (pages 83-84 printed record) setting forth in the second section thereof that the City rents

from the appellee herein certain fire hydrants "for the unexpired term of the franchise of said Water Company." The ordinance of November 21, 1892, (pages 84-85 printed record) contains the same language as does the ordinance of May 7, 1894, (pages 85-86 printed record) which uses these words relative to the rental of the fire hydrants therein mentioned:

"For the unexpired term of the franchise of the said Water Company subject to all the conditions and limitations in the original contract with said Company." (Printed record page 86). Manifestly reference was here made to the contract made with the Owensboro Water Company under the ordinance of September 10, 1878; (printed record page 41-45); for the ordinance of June 3rd, 1889, (printed record pages 15-17) does not attempt to make any contract with the Owensboro Water Works Company and goes no further than accepting that Company in lieu of the Water Company in the contract which had already been made under the ordinance of 1878. So the ordinance of October 1, 1894 (printed record pages 51-52) uses substantially the same language, as likewise does the ordinance of September 16, 1895, (printed record pages 55-56); and the reference is all the time back to the contract existing under the ordinance of 1878.

Under this construction, these rentals, of course, cease to become due at the period limited for the expiration of these contracts and franchises under the ordinance of 1878.

Certainly the City of Owensboro so understood the rights of these parties; for in 1903, and prior thereto, the City at a cost of something like $400,000.00, built and equipped a water works plant of its own. (Stipulation of facts, printed record page 110). It did this clearly understanding, both from the language of the grants and the conduct of the appellee, that the rights and license granted to appellee and to its predecessor, the Owensboro Water Company, expired on September 10, 1903.

It was when the City had voted to issue bonds and took upon

itself this heavy burden for the purpose of building and equipping this water plant that the appellee herein for the first time took the position that its franchise and rights in the streets did not end in 1903, or at the expiration of the twenty-five years provided for in the original grants.

The appellee on September 21, 1903, filed its Bill in Equity in the Circuit Court of the United States and in that bill the appellant herein was defendant. (Printed record pages 57-81). A copy of that bill is filed with the answer herein and it is therein averred by the appellee that the rights and franchises claimed for the Owensboro Water Company should remain in force and effect for twenty-five years from the passage of the ordinance embracing that contract and the acceptance of the provisions of that ordinance by the Owensboro Water Company is fully set out. Likewise the ordinance of June 3, 1889, is quoted in full in said bill, together with the preamble thereto, and it is stated by complainant therein as follows:

> "and the grant of the rights, franchises and privileges aforesaid were then made directly to the said Owensboro Water Works Company and were in addition to the rights, franchises and privileges which it acquired by its purchase of the rights, franchises and privileges by the Owensboro Water Company and extended during the whole period of its corporate existence, a period of twenty-five years from and after the first of June, 1889." (Printed record page 67).

It is further averred by the apellee in that bill as follows:

> "The said Owensboro Water Works Company has acquired and now has conferred upon and vested in it the sole and exclusive right, franchise and privilege during the period of twenty-five years from and after June 1, 1889, to maintain, complete and operate water works in the City of Owensboro." (Printed record page 68).

and it is further therein averred,

"but if the said contract shall not be construed to fix the price of hydrants after the expiration of twenty-five years from the date of the original contract with the Owensboro Water Company, then your orator most respectfully states that the said contract does confer and vest in it the exclusive privilege of furnishing water through hydrants to the said city during twenty-five years from the 1st day of June, 1889, at reasonable prices from and after the expiration of the original contract with the Owensboro Water Company." (Printed record page 68).

And filed with and as a part of the said bill were the several copies of the ordinances showing these contracts and filed with the defendants' answer in this suit and hereinabove referred to. (Printed record pages 81-91).

It is further averred in the bill aforesaid filed by the complainant in that matter that,

"it is ready, willing and able to continue to carry out its said contract and to continue to perform and do all the things required therein until the expiration of said contract on June 1, 1914." (Printed record pages 68-69).

It is again reiterated in said bill that the City

"being thereunto authorized did by the ordinances aforesaid make and enter into a valid and binding contract with this complainant whereby and wherein an obligation was created on the part of this complainant to lay its pipes, conduits and hydrants in and on the streets of said City and to furnish therefrom for a period of twenty-five years from and after the 1st day of June, 1889, water for all public and private purposes to the said City and to its inhabitants, and the assuming of this obligation was the consideration for the grant by the City to your complainant of the rights, privileges and franchises aforesaid." (Printed record page 72).

The purpose and the prayer of said bill was to enjoin the City from selling its bond or levying any taxes for the purpose of building water works and also from entering upon the streets, alleys and other pub-

lic places in the City for the purpose of laying pipes or conduits or turnouts therein, and from "constructing, equipping, operating or maintaining a system of water works in said City at any time until after the first day of June, 1914." (Printed record page 80).

It will thus be observed that when the defendant City was embarking upon the enterprise which it afterward completed at great cost to itself, of building its own water works, the appellee herein construed the grants of right to use the streets as claimed in its bill to expire in June, 1914, or twenty-five years after the ordinance of June 3, 1889.

The appellee was unsucessful as complainant in that law suit; but the appellant was further led to believe by the allegations in its bill and its conduct of that suit that the appellee was placing the same construction upon the ordinance of 1878 as was claimed by the City —or at most the appellee was saying that its rights and franchises in the streets expired in 1914.

With this information and acting upon this construction of the contract the City proceeded to expend large sums of money in building its own water works, thus acting upon the construction which we submit the appellee is now estopped to contradict or dispute—especially as this construction is borne out by the ordinances themselves and from consideration of right, as we think.

So again the appellee herein filed its petition in the Daviess Circuit Court on May 27, 1904, copy of which is filed as an exhibit with the answer herein under proper stipulation, and in which appellee again averred that its franchises and privileges extended for a period of twenty-five years from and after June 1, 1889. (Printed record pages 91-108). In the suit thus begun by the appellee against the City of Owensboro it was held and determined by the Court that its contract for hydrant rentals terminated in 1903, and not in 1914, as claimed by it therein. Judgment was entered accordingly which remains binding upon the parties hereto. The Court did not determine, however, the period at which the complainant's easement in the streets would terminate.

THE LAW.

Counsel for the appellant City contend that the law upon this subject as enunciated in the opinions of many courts, and especially this Court, sustain the City's construction of the contracts existing between the parties to this litigation. Concerning this rule of construction we quote from the opinion of Mr. Justice Nelson in City of Chicago vs. Sheldon (76 U. S., 56; 19 L. Ed., 296):

> "In cases where the language used by the parties to the contract is indefinite or ambiguous and, hence, of doubtful construction, the practical interpretation by the parties themselves is entitled to great, if not controlling influence. The interest of each generally leads him to a construction most favorable to himself, and when the difference has become serious and beyond amicable adjustment, it can be settled only by the arbitrament of the law. But, in an executory contract, and where its execution necessarily involves a practical construction, if the minds of both parties concur, there can be no great danger in the adoption of it by the court as the true one."

The opinion of Mr. Justice Day in Blair vs. Chicago (201 U. S. 400; 50 L. Ed., 801) is an extended discussion of the points involved in this case. That was a suit growing out of the construction of certain ordinances and grants to the city Railroad by the City of Chicago of certain easements and rights in the streets of the city. We quote:

> "It is incumbent upon those claiming under a public grant, as we have already stated, to make out the rights contended for by terms which clearly and unequivocally convey them, and it is enough to deny the privileges contended for if upon considering the act, the mind rests in doubt and uncertainty as to whether they are intended to be conferred." (Blair vs. Chicago, 201 U. S. 400).

Mr. Justice Day's opinion in the Blair case involved the construction of a number of ordinances granting certain franchises and rights to the Street Railway Companies. These ordinances, as in the case

at bar, were passed at different times, but evidenced a general course of dealing between the two parties to the contracts. Referring to the question of the time during which some of these franchises extended the Court said:

> "The other ordinances by direct terms or references to prior ordinances have made the grants for the west side system for the term of twenty-five years, and until purchased by the City, in the manner stated, and we do not think there was any intention to depart from the plan in this one ordinance omitting specifically to name a definite time of occupancy. At this time there had been no extension of the life of the corporation, and it was specifically limited to twenty-five years."

So in the case of Joy vs. City of St. Louis, (138 U. S., 1; 34 L. Ed., 843), this Court discussed at length a tri-partite agreement. In that case many grants and rights referred back to the original agreement between the park comissioners and the two railroads first involved in the matter . The Court in discussing these later contracts said:

> "The right of the mortgagees and of the purchasing committee to use such right-of-way is based solely upon that agreement; and, holding under it, they must hold subject to its terms and conditions, irrespective of the question of notice."

The whole question is also discussed in Louisville Trust Company vs. City of Cincinnati, an opinion by Judge Lurton for the Circuit Court of Appeals for the Sixth Circuit. In that case a number of grants of easements in the streets of Cincinnati which had been made to the Cincinnati Inclined Plane Railway Company were up for construction by the Court. The Court clearly declares in that case the right of a municipality to fix by agreement the duration of all such easements. Although the corporate franchise may be granted by the State, with the right to use city streets under terms to be agreed upon by the municipal authorities, this right on the part of the City

Council enables them in every such case to fix by contract the duration of the easement. Among other things in that case, the Court said:

> "This right to impose terms and conditions most obviously implies the right to agree upon the duration of such occupancy. The right to exclude altogether, unless resort be had to condemnation, involves the right to limit the period of the grant." * * * *
>
> "The City was but a trustee acting for the public in respect of the granting of street easements. The mode in which it might grant such street rights was specifically prescribed by law. It was not, therefore, competent for the Board of Public Affairs to extend such an easement without the concurrent action of the Legislative Branch of the Government, and the mere non-action of the municipal government, after the expiration of a part of the street grants under which the Company was occupying the streets, neither creates an estoppal nor operates as an extension of the grants which could only be extended by ordinance duly enacted." (76 Federal Reporter 296).

Nor do we think there is anything in the recent case of City of Owensboro against Cumberland Telephone & Telegraph Company which militates against the position we have taken in this matter. We regard the right of the City to revoke the power which it granted to the appellee under the ordinances in question as being settled in Mr. Justice Lurton's opinion in the Telephone case. However, in that case the ordinance itself under which the Telephone Company was operating and claiming easements in the streets did not attempt to fix any time limit upon the grant. The Court found that it was competent for the City Council to make such a grant unlimited as to time, and when that was done it amounted to a perpetual right to use the streets. This Court will at once note the wide difference between the contract in the Telephone case and the one involved here. The City is not attempting to discuss here the power of the City Council under delegation from the State Legislature to grant to the appellee a perpetual franchise to use the streets.

What the City is contending is: That under no just or proper construction of the ordinances fixing the rights of the parties to this suit

can this Court hold that the City ever intended to or did grant any such perpetual franchise to the Owensboro Water Works Company in the contracts therein set forth.

We call the Court's attention to the fact that when the franchise was originally granted in September, 1878, the City of Owensboro did not have a waterworks system and for the purpose of obtaining for its citizens a system of water works it granted to the Owensboro Water Company a franchise to use its streets and public ways in which to lay its pipes, mains, etc., but limited the franchise to the term of twenty-five years . Under that ordinance the City could force the Water Company to so equip its plant that it would be able to furnish the City and its inhabitants with water. Then why should the City in 1889, when it already had a complete system of water works, without any further consideration and without any benefits flowing to the City, extend the franchise perpetually, when the City already had a system of water works under a contract that bound the Water Company to so equip itself as to furnish to the City's inhabitants and to the City such water as it needed? There could be no reason why the City should voluntarily and without any consideration make a perpetuity out of the franchise it had already granted for a term of years and under which the Water Company and the City were acting, and by the terms of which it had all the rights and benefits it could possibly get. Unless the Court shall hold that by the ordinance of June 3, 1889, the appellee obtained a perpetual franchise then the judgment herein is erroneous and should be reversed.

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City of Owensboro.

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Supreme Court of the United States

City of Owensboro, - - - Appellant,

Vs. BRIEF FOR APPELLEE.

Owensboro Water Works Company, of Owensboro, Ky., - - - Appellee.

MAY IT PLEASE THE COURT:

STATEMENT.

If Appellant had made an accurate statement of the case, presenting the questions involved on this appeal, it would not be necessary for Appellee, under Rule 21 of this Court, to make any additional statement. But since neither of the two conflicting and apparently irreconciliable briefs filed by Counsel for Appellant present, as we think, an accurate statement of the case, Appellee submits the following, which its Counsel hope the Court will find reasonably accurate.

Appellee, Owensboro Water Works Company of Owensboro, Daviess County, Kentucky, is a corporation created under and by virtue of the general Corporation laws of the State of Kentucky.

Among the powers conferred upon it by its Articles of Incorporation and under the Corporation laws of the Commonwealth of Kentucky, is the right to own, maintain and operate a system of Water Works in Owensboro for the purpose of supplying said City and the inhabitants thereof with water for public and private purposes; to contract and be contracted with, to sue and be sued and in its corporate name: "The Owensboro Water Works Company of Owensboro, Kentucky."

Its original Articles of Incorporation were signed and acknowledged on the 3rd day of June, 1889, and recorded in the County Court Clerk's office of Daviess County, Kentucky, and a certified copy filed with the Secretary of State, as required by law.

By the terms of these Articles of Incorporation, it is provided that the Corporation should terminate in twenty-five years from and after its incorporation subject to such extensions of its corporate existence as was and is allowed by the laws of the State of Kentucky. (Record p. 12.)

Section 6 of Appellee's charter is in the following language: "The time of commencement of said corporation is the 1st day of June, in the year 1889, and it shall terminate twenty-five years thereafter, *subject to such extensions of its terms of existence as by law provided.*"

In virtue of and in conformity with the general Corporation

laws of the Commonwealth of Kentucky, Appellee did, by amended Articles of Incorporation, on the 6th day of May, 1914, extend the life of Appellee Company for twenty-five years from and after the 1st day of June, 1914, which Amended Articles were duly signed, executed, acknowledged and recorded, as required by law. (Record p. 14.)

Prior to the Incorporation of Appellee, a corporation known as Owensboro Water Company was created and organized under the laws of the State of Kentucky, said Water Company had conferred upon it the power to contract and to be contracted with and to operate in the City of Owensboro a system of water works for supplying said City and the inhabitants thereof with water, both for public and private purposes and to have granted to it by said City the *right, privilege and franchise* to lay water pipes, conduits and other necessary appliances in the streets, alleys and other public places in the City.

After the incorporation of the Owensboro Water Company, on the 10th day of September, 1878, Appellant City, being duly authorized and empowered so to do by its charter, made a contract with the Owensboro Water Company wherein to it, its successors and assigns, were granted the right, privilege and franchise to construct and operate in the City of Owensboro a system of water works for supplying said City and its inhabitants with water from the Ohio River, and the right and franchise to use the streets, alleys and other public highways within said City, or within its future limits, for the purpose of laying its pipes, etc., and for the purpose of repairing said pipes, hydrants, fountains, etc.

The City of Owensboro largely increased in population after the incorporation of the Owensboro Water Company in 1878, and the territory within the corporate limits of the City had been so extended as to include large areas not theretofore embraced therein and it was then necessary that large extensions and improvements should be made in said water works system.

The *Owensboro Water Works of Owensboro, Kentucky*, (Appellee) was incorporated with a capital stock of $300,000.00. It proposed to purchase the Owensboro Water Company and all its rights and franchises, but was not willing to do so, except by the express consent and by the authority of Appellant City of Owensboro. And the further grant to it of a franchise by the City to maintain in its streets and public ways its system of water works.

Appellant City thereupon, in order to induce Appellee to purchase the old water works system of Owensboro and to make the necessary extensions and improvements to meet the increased demands of the City and its population, did, on the 3rd day of June, 1889, enter into a contract with Appellee by which Appellant ,City of Owensboro, granted to Appellee, *its successors and assigns, for and during its corporate existence the franchise, license and privilege* to maintain, complete and operate a water works system in the City of Owensboro, and to use the streets and alleys and other public highways in said City for laying, repairing and taking up its mains, service pipes, hydrants and other apparatus for supplying the City of Owensboro and the inhabitants thereof with water.

This contract of June 3rd, 1889, was evidenced by an

ordinance which was passed by the Mayor and Common Council of the City of Owensboro, on Monday, June 3rd, 1889, which ordinance and the record of the meeting of the Common Council are copied in the bill of Appellee in this case. (Record pp. 4-6.)

Appellee accepted the ordinance, contract and the grant therein contained, and in pursuance thereof, and relying upon the rights, privileges and franchises thereby and therein conferred upon and vested in it, and relying in good faith that Appellant City would perform its contract, Appellee, at great expense, purchased the water works of the Owensboro Water Company, and did, as soon as possible after its said purchase, extend and complete a large and valuable system of water works in the City of Owensboro, which it has ever since owned and now owns, operates and maintains in the City of Owensboro, fully equipped to furnish the City and its inhabitants with wholesome water.

When it accepted said ordinance, passed by Appellant City, the agreement and contract between it and the said City became, was and is an irrevocable contract between Appellant and Appellee.

The Ordinance of June 3rd, 1889, and the contract between Appellant and Appellee appear at pp. 15-16 of the record.

On the 6th day of May, 1914, and before Appellee's charter expired, it extended its corporate life by Amended Articles of Incorporation, which it had the right, under the law, to do. (Record, p. 14.)

On the 7th day of November, 1901, Appellant passed an Ordinance, which of course was directed at Appellee, and for no other purpose, wherein Appellant by said ordinance, attempted to prohibit Appellee from laying or taking up pipes, or repairing any of its water pipes in the City of Owensboro. (Record p. 17-19.)

This ordinance was passed by Appellant while Appellee was in the full enjoyment of its franchise, as above stated, and while it was carrying out all the provisions of its contract with Appellant; the said ordinance was in violation of the contract and was intended to and did impair the obligation of the contract between Appellant and Appellee.

Again, on July 6th, 1914, Appellant, without the consent of Appellee, and in violation of the City's contract with it, and in violation of the Constitution of the United States and of the Constitution of the State of Kentucky, passed a resolution directing the City officials to notify Appellee, Water Works Company, that it must cease to dig up, or disturb the streets, alleys and other public ways of the City, in any way whatever, and instructed the Mayor to take all necessary steps to make said notice and order effective.

The City Engineer was instructed, under the resolution, above mentioned, not to grant a permit to Appellee to dig up, or disturb the streets of the City of Owensboro. (Record pp. 9-10.)

Pursuant to said resolution, the Mayor and Common Council of Appellant City refused, under any conditions, or circumstances, to grant Appellee any permit to make any excavations

in any of the streets, alleys or sidewalks, or public grounds of the City for any purpose, and prohibited it and its officers and agents from exercising its franchise to maintain a water works system in the City of Owensboro, and moreover, was threatening to take out warrants of arrest against Appellee, its officers and agents if they, in any wise attempted to lay, or take up pipes, or water mains in the streets and alleys of the City of Owensboro.

The direct result of the resolution and the enforcement of the ordinance of 1901 made it impossible for Appellee to operate its water works system in the City of Owensboro, or to exercise its franchise therein and it will be compelled to abandon its water works system and to lose all its valuable property, rights and franchise then and now existing.

In the state of case set forward in the bill of complaint, after a careful hearing, the lower court granted an injunction and made it perpetual on the final hearing, filing a written opinion, (Record pp. 111-118), from which judgment this appeal is prosecuted.

What Answer of Appellant Admits.

The defendant in its answer, expressly admits that Complainant, The Owensboro Water Works Company of Owensboro, Kentucky, *is a corporation created and doing business*, as set forth in its bill; that its Articles of Incorporation were signed acknowledged and lodged for record, on June 3rd, 1889, in the County Clerk's office of Daviess County, Ken-

tucky, and duly recorded therein, and a properly certified copy thereof filed with the Secretary of State for the Commonwealth of Kentucky. (Record pp. 21-22.)

Appellant admits that by the terms of said Articles of Incorporation, it was provided that said corporation should terminate in twenty-five years after the date of the incorporation and that by the written consent of more than three-fourths of the stockholders of Complainant Company, its board of directors on May 6th, 1914, did sign, execute and acknowledge Amended Articles of Incorporation and filed same in the County Clerk's office of Daviess County, Kentucky, and a copy thereof with the Secretary of State of Kentucky, *wherein and whereby the corporate life of the Complainant Company was extended, by said amendment, for a period of twenty-five years from and after June 1st, 1914, and that Complainant Company is now a body corporate under the General Corporation laws of the State of Kentucky.* (Italics are ours.) (Record p. 22.)

Appellant admits that the City of Owensboro is a Municipal corporation, organized, created and existing under the laws of the State of Kentucky as a City of the third class, and in the manner and form set forth in Complainant Company's bill; it admits that by the Act of February 16th, 1866, and by the Act of March 6th, 1876, the Common Council of the City had conferred upon and vested in it full power to make, establish and regulate wells, cisterns, reservoirs, pumps and everything for the furnishing of the City and its inhabitants with water, and to contract for the construction, maintenance and operation of a system of water works in said City for said pur-

poses, and to grant to others the privilege of operating and maintaining same, and that all of said powers were continued and remained vested in the Common Council of defendant City, by an Act of March 18th, 1882. (Record p. 22.)

Appellant admits that "By the Articles of Incorporation filed, executed and recorded, as set forth in the bill, there was created on the 9th day of September, 1878, a corporation known as "The Owensboro Water Company and that said Company had conferred upon it by law, and by its Articles of Incorporation, all the power and authority set forth in Complainant's bill."

It admits that on the 10th day of September, 1878, the City, being duly authorized and empowered upon that date, made a contract with the Owensboro Water Company, on the 10th day of September, 1878, wherein it granted to it, its successors and assigns, the right, privilege and franchise to conduct and operate in the City of Owensboro, a system of water works, and the right and privilege to use the streets, alleys and other public ways within said City, or its future limits, for the purpose of laying its pipes, conduits, hydrants and fountains for the supply of water and for the purpose of repairing said pipes, conduits and hydrants so maintained in the streets and other public places within said City, but attempts to claim that said contract, privilege, grant and franchise were specifically limited by the terms thereof to a period of twenty-five years from and after the passage of said ordinance of September 10th, 1878.

It admits that "on June 3rd, 1889, the City of Owensboro had greatly increased in population and territory," but denied

that there was any necessity to make extensions or improvements.

Appellant attempts to traverse the allegations of the bill and the statements contained in its ordinance of June 3rd. (Record p. 23.)

Appellant admits after the ordinance of June 3rd, 1889, was adopted by the Mayor and Common Council of the defendant City, appellee accepted said ordinance and the grants therein contained and purchased from the Owensboro Water Company its plant and property and that it has, from time to time, extended its water works system, but it attempts to deny that any privileges, or franchises, were granted by the said ordinance, except only the privilege and right of Complainant Company to purchase and conduct the plant, business and rights thereto extended to the defendant, the Owensboro Water Company, in the ordinance of September 10th, 1878.

It admits that Complainant Company owned, operated and maintained a water works system in the City of Owensboro, but denied that "it was fully equipped, or equipped at all, to supply the City of Owensboro, or the inhabitants thereof, with *wholesome water*," or that when said ordinance was accepted by Complainant Company it then and thereby became and was, or is now an irrepealable contract.

The passage of the ordinance of November 7th, 1901, by the Mayor and Common Council is admitted; it admits that under the resolution of July 6th, 1914, the Mayor, Common Council and City Engineer were refusing, under any conditions, to grant to Complainant Company any permit to dig any trenches, or to make any excavations in any of the streets,

alleys, sidewalks or public grounds of defendant City, for the purpose of laying, taking up, or repairing any of its water pipes, or to make any connections with any of its water pipes, and claiming the right, power and authority to prohibit Complainant Company, its officers and agents from exercising its franchise to maintain water works in the City of Owensboro, and denied that Complainant Company had any right or authority to operate a water works system in the City of Owensboro. (Record p. 26.)

It admits that appellant would prevent the Complainant Company from doing any of these things, and that it would take out warrants against it and its officers and would subject it and its officers to prosecution in the City Court.

In the second paragraph of its answer, the City pleads the ordinance of September 10th, 1878, and that its rights and Complainant Company's rights were regulated by said ordinance and that the ordinance of June 3rd, 1889, was simply for the purpose of giving its assent to the sale of the Owensboro Water Company and the purchase by the Owensboro Water Works Company, and that it did not thereby extend, or grant any privilege to the Owensboro Water Works Company of Owensboro, Kentucky. (Record pp. 26-31.)

It pleads the ordinance and the suit instituted by the Complainant Company, attempting to show that this was the construction placed by the Owensboro Water Works Company upon the ordinance.

A stipulation of facts was filed herein on the 10th day of December, 1914. (Record pp. 108-111.)

Among other facts agreed in the stipulation were:

"That the Owensboro Water Works Company of Owensboro, Kentucky, is a corporation organized under the laws of the Commonwealth of Kentucky and that a correct copy of its charter is on file as an exhibit and may be used as evidence in the case, and that a correct copy of its Amended Articles of Incorporation is attached to the bill as an exhibit, and may be used as evidence in this case."

2nd. "That the ordinance of June 3rd, 1889, copied in the bill, is a correct copy of the ordinance passed by the City of Owensboro." (Record pp. 105-109.)

3rd. "That the Complainant Company had a water works system in the City of Owensboro, which it maintained in said City and was engaged in furnishing to many of the inhabitants of the City of Owensboro, water for domestic purposes, and its property is worth not less than $250,000.00, and the value of its franchise or right to maintain and operate said water works in said City of Owensboro in supplying to the City and its inhabitants water for public and private purposes and to use within the present and future limits of Owensboro, the streets, alleys and other public highways thereof, and this right, or franchise is of greater value than $10,000.00, and that the ordinance adopted by the said City, of date November 7th, 1901, is a correct copy of the ordinance passed by the City of Owensboro." (Record p. 109.)

4th. "That the ordinance, or resolution adopted by the City of Owensboro July 6th, 1914, is correctly copied in the bill." (Record p. 109.)

5th. "It was further stipulated that the City of Owensboro was created a Municipal Corporation by an Act of the General Assembly of Kentucky, on February 16th, 1866, and was thereafter continued as a Municipal corporation, by Acts of the General Assembly, one of which was approved March 6th, 1876, another approved March 6th, 1882, and another entitled 'An Act Incorporating Cities of the Third Class,' approved June 14th, 1893." (Record p. 109.)

6th. "It is stipulated that the ordinance of September 10th, 1878, was regularly passed by the Common Council of the City of Owensboro, and approved by the Mayor, became a law and was a valid and subsisting ordinance." (Record p 109.)

It stipulated that the ordinances of February 2nd, 1891, the ordinance of October 6th, 1890, the ordinance of February 7th, 1891, the ordinance of November 7th, 1892, the ordinance of December 5th, 1892, the ordinance of October 1st, 1894, the ordinance of May 7th, 1894, and the ordinance of September 16th, 1895, are each correctly copied, and could be read and considered as evidence; that during the year 1903, and subsequent thereto, defendant City proceeded to erect and equip a large modern water works system, fully adequate to supply the City of Owensboro and vicinity with wholesome water, costing approximately $400,000.00. (Record p. 109.)

It is further stipulated that on the 21st day of September, 1913, Appellee (The Owensboro Water Works Company) filed its bill in Equity, in the District Court of the United States for the Western District of Kentucky and that that bill and

amendment thereto are correctly copied, and that on March 27th, 1904, Complainant Company filed its petition against the City of Owensboro, Kentucky, in the Daviess Circuit Court and that the copy of said suit shown by the exhibit is a correct copy. (Record p. 109.)

Upon these agreed facts and the oral testimony of James J. Sweeney, this suit was submitted to Hon. Walter Evans, presiding Judge of the United States District Court for the Western District of Kentucky. (Record pp. 124-125). The admissions in Appellant's answer and the facts stipulated substantially put it out of Court.

ARGUMENT.

Exhibit "M" filed with Appellant's answer and relied on as an estoppel, was a suit filed by Appellee against the City of Owensboro, on the 21st day of September, 1903, claiming that under the ordinances, its Articles of Incorporation and charter, that if it did not have the exclusive right, franchise and privilege to occupy the streets of the City of Owensboro with its water pipes, mains, hydrants and other apparatus, to furnish water to the City of Owensboro and the inhabitants thereof, and to conduct a system of water works of its own and to use the streets, alleys and other public places for the purpose of laying its pipes, etc., that the act of the City in establishing a rival water works system were in violation of the contract existing between Appellee and Appellant and an impairment thereof and that the attempt of the City to construct a plant of its own

was a violation of the contract and of the Constitution of the United States, in that it was depriving Appellee of its property without due process of law.

An injunction was sought against the City to enjoin it from any attempt to sell any of its bonds for that purpose.

That bill is not in conflict with any allegation in the bill here, nor an estoppel upon Appellee.

At the time of filing that bill, no one knew, or could have known, that in 1914, the life of Appellee Corporation would be extended. It was alleged in that bill that the life of Appellee expired after June 1st, 1914. (Record p. 69.)

Exhibit "K" filed with the answer was a suit by Appellee (Owensboro Water Works Company of Owensboro, Kentucky) to recover of the City the sum of $1,800.00, hydrant rentals due on the 1st day of October, 1903, and the further sum of $1,880.00, hydrant rentals with interest from December 31st, 1903.

That suit was filed on the 27th day of May, 1904, ten years before the expiration of Appellee's Articles of Incorporation. In that suit it was averred that Appellee was incorporated June 1st, 1889, and that its corporate existence continued for twenty-five years thereafter. (Record p. 92.)

There is no allegation, or statement therein in conflict with any of the allegations of the petition in this case, or that constitute an estoppel. The doctrine of estoppel has no application to the facts contained in Exhibits M and K, or either of them, filed with Appellee's answer or to the recitals contained in any other exhibit filed therewith, hence we dismiss the con-

tention that Appellee is estopped, or that the doctrine of estoppel has any application in this case.

By Section 6 of the Articles of Incorporation, Appellee was authorized to begin business on the 1st day of June, 1889; the life of the Corporation, by its articles, *was to continue from the 1st day of June, 1889, for a period of twenty-five years thereafter*, subject to such extensions of its term of existence as by law provided. By said articles, its corporate life began on June 1st, 1889, and continued after that date for a period of twenty-five years, or until the 2nd day of June, 1914.

On the 6th day of May, 1914, while the corporation was alive and in full force and effect, its life was by and under the terms of its amended Articles of Incorporation, and pursuant to the laws of Kentucky then and thereby, continued for an additional period of twenty-five years, the additional period beginning the 1st day of June, 1914, and continuing from and after that date for a period of twenty-five years.

The amended Articles of Incorporation (Record p. 14), show that it was the intention of the directors on that date, in pursuance of the written consent of more than two-thirds of its stockholders to amend its Articles of Incorporation, and that they did amend the Articles, and did on that day extend the life of said corporation for a period of twenty-five years, beginning on the 1st day of June, 1914, the date the extension was to begin, as stated in the amendment and terminate twenty-five years thereafter.

Appellee's corporate life was then extended for an additional period of twenty-five years. The Court will observe that this

extension was made while the corporation was alive; its purpose was to extend its corporate life. The cases cited by Appellant show that the thing there done was after the life of the corporation had expired, and after the time, in which to amend the charter, had expired. Not so here, the charter was amended while the corporation was alive and had power to extend its corporate life; the date on which the extension was to begin is immaterial.

The answer admits that Appellee was a corporation, that it had extended its life and that it was an existing corporation at and on the dates it instituted this action.

The stipulation of facts signed by the parties to this appeal, which was read as evidence in the Court below, admits that Appellee is a corporation organized under the laws of the Commonwealth of Kentucky.

It hence follows, necessarily, as we think, that only the issues made by the pleadings and the agreed facts can be reviewed on this appeal. (Brooklyn & Mill Co. vs. Miller, 227th U. S. 194; Cormel Bros. Co. vs. H. Diedrichesn & Co. 130th C. C. A. 251; City of Helena vs. Helena Water Company 195th U. S., 383.)

In Arkansas Valley Sugar Co. vs. F. T. Lyon Co., 97th C. C. A., 551, the Court said:

> "A stipulation to settle controversies, or to assist a Court in deciding them, ought not to be discouraged by a narrow and unreasonable construction that would defeat the manifest intention of one of the parties acceded to by the other." (Vol. 9, page 4999, F. R. Digest.)

In view of the facts stipulated and the admissions contained in the answer, Counsel for Appellee insist the only question that can be inquired into on this appeal, is whether or not Appellant, by the ordinance of June 3rd, 1889, granted Appellee, its successors and assigns, a franchise and privilege to occupy the streets of the City for and during the existence of the corporation for the purpose of laying, repairing, taking up mains and service pipes, etc., for the supply of water.

Let us again emphasize that the single question presented by this record is: Did Appellant grant Appellee a franchise for and during its corporate existence, by the ordinance June 3rd, 1889, or did it merely grant it a license to occupy the streets for the unexpired term of Appellee's predecessor, Owensboro Water Company, whose corporate existence expired in 1903. We cannot too earnestly insist that this is the sole question involved on this appeal.

Appellant Seeks to Break Away From the Issues Tried in the Lower Court and to Inject Matters Not Raised Either in the Pleadings, the Stipulation of Facts or the Assignment of Errors.

Appellant, apparently dissatisfied with the case it tried in the lower court, has filed a second brief in this Court, in which questions are argued which cannot be made either by the pleadings, stipulation of facts, or assignment of errors.

While the matters argued in this last brief of Appellant are

wholly outside of the record, and as we think, cannot be taken notice of by this Honorable Court on this appeal, we notice them briefly, because neither of the two positions argued in the last brief filed would be available if presented in a case where the issues were made by the pleadings and the facts.

The questions attempted to be made in this last brief, roughly stated, are:

1st. That under the present corporation laws of Kentucky, no power is given a corporation to extend its corporate existence.

2nd. That Appellee's charter expired the 31st day of May, 1914, and that it had no power thereafter to extend its corporate existence.

The record shows Appellee extended its corporate existence on the 16th day of May, 1914, and whether that extension of its existence began on the identical day its original Articles of Incorporation expired, is a matter of no concern. If Appellee had the right to extend its corporate life and did so while it was a live corporate body, the date on which the extension was to begin in no wise affects the extension of its life. The sole question is: did the corporation have the power to extend its life on the day it attempted to do so. If it did, the question when that extension was to take effect is wholly immaterial.

The fact is that Appellee did extend its corporate existence, and that is admitted both in the answer and the stipulation of facts.

It is claimed in the second brief filed by Appellant that under the present corporation laws of the State (Section 561

and Ky. Statutes 2147) when any corporation expires, by the terms of its Articles of Incorporation, it cannot thereafter exist, only for the purpose of closing up its business, and for no other purpose.

The case of the Home Building Association vs. Bruner, Secretary of State, is cited. In that case the corporation, about two years and five months after its Articles of Incorporation had expired, attempted by amended Articles, to continue its corporate life; but in this case, while Appellee is admitted to have been alive, extended its corporate existence for twenty-five years. The Corporation, in this case, acted while it was alive; in the Home Building Association case, the corporation had been dead two and one-half years before it attempted to act.

It is stated in the last brief that what was said in the Home Building Association vs. Bruner about the beginning and ending of the Corporation is "*obitur dictum*," hence the determination of the question is not binding upon this Court.

The slightest considerations of the decisions of the Court of Appeals of Kentucky (which is a Court of last resort) will show that under the present corporation laws of the State, a corporation may, during its life time, extend its corporate existence.

It is argued in this second brief that as the charter of Appellee was granted to begin on the 1st day of June, 1889, that it expired on the 31st day of May, 1914, and that under section 561, Kentucky Statutes, it had no power to exist after that date.

Argument is made to the effect that "If a statute requires

a notice to be given, or any other act to be done on a certain day before a motion or pleading, it must be done that day, regardless of the time of such motion or proceeding, but the day on which such notice is given, or such act is done, may count as one day and part of the time."

A Corporation, Under the Present Law, May Extend Its Corporate Existence.

Argument is made in the second brief that a corporation, under the present Statutes of Kentucky, cannot extend its corporate existence.

It is quite sufficient to say, in answer to this, that the Court of Appeals has, over and again, since the adoption of the present Constitution of the State, and since the enactment of the present statute laws, held that a corporation has the power to extend its corporate life.

The Home Building Association vs. Bruner, Secretary of State, 134th Ky. 300, holds that a corporation, under the present Kentucky law, may extend its existence, provided that right is exercised (as was done in this case) during the life of the corporation.

In the case of the Ohio Valley Tie Company vs. Bruner, Secretary of State, 148th Ky., 358, etc., the same doctrine is affirmed.

In the last cited case, the Ohio Valley Tie Company had fixed its corporate life at twenty-five years, and before the end of that time, to-wit: in 1910, it extended its corporate life for

twenty-five years from that date. When it filed its amended Articles of Incorporation with the Secretary of State, he declined to record same, unless there should again be paid the State tax.

The Tie Company mandamused the Secretary of State to compel him to record the Articles. The Kentucky Court of Appeals said:

> "The general authority throughout the union upholds the right of a corporation to extend its life by amendment. Section 559, Kentucky Statutes, granted this right and when read in connection with Section 539, is in line with this view. Though the question under the present statute has not been answered directly, by this Court, the right has been admitted in the case of the Home Building Association vs. Bruner, Secretary of State, 134th Ky., 300. Indeed the Statute admits of no other construction."

CRECELIUS, SECRETARY OF STATE, VS. CARROLLTON SAVINGS & LOAN ASSOCIATION, 167TH KY., 813, ETC.

Carrollton Savings and Loan Association was a corporation created prior to the adoption of the present Constitution and the passage of the present corporation laws of the State of Kentucky; it was incorporated on the 1st day of April, 1890, and by the terms of its Articles, was to continue for twenty-five years.

Before the expiration of its original charter (on the 29th day of March, 1915,) the written assent of the owners of more than two-thirds of the capital stock having been obtained, the

corporation amended its original articles by striking out the words "shall continue to exist for a period of twenty-five years from the date of filing these articles in the County Court Clerk's office" and substituting therefor the words "shall continue to exist until the first day of April, 2000."

The Secretary of State declined to record the amended Articles until the corporation should pay the organization tax, insisting that the extension of the corporate existence of the Company amounted to the organization of a new corporation.

The Court of Appeals of Kentucky in that case held that the corporation, though originally created prior to the passage of the present corporation laws of the State had the right, when it had accepted the provisions of the Constitution to extend its corporate existence and said:

> "Such a corporation (referring to corporations prior to the passage of the law of 1893) after having accepted the provisions of the Constitution, are authorized to *adopt such amendments upon the same terms and conditions as a corporation which was organized under the present law. When it accepted the provisions of the Constitution, it became entitled to the same privilege and subject to the same restrictions as a corporation which was organized under the law since the adoption of the Constitution.*"

In other cases, the Kentucky Court of Appeals has held the same thing; there cannot be any doubt that under the present corporation laws of the State, a corporation has the right, during its existence, to extend its corporate life beyond the term of its original corporate existence, and that is precisely what Appellee in this case did.

When Did Appellee's Original Charter Expire?

It is argued in the second brief that Appellee's original charter expired on the 31st day of May, 1914; this is an unsound contention, in view of the terms of Appellee's original charter and the construction the Kentucky Court of Appeals has placed upon section 453, Kentucky Statutes, which Statute is as follows:

> "If a statute requires a notice to be given, or any other act to be done a certain time before any motion or proceeding, there must be that time exclusive of the day for such motion, or proceeding; but the day on which such notice is given, or such act done, may be counted as one day and part of the time."

We observe in the first place that the Statute quoted and relied on by Appellant has no application to this case.

The section refers to notices required to be given by the Statutes of Kentucky, and no notice for the extension of the life of a corporation is required by any Kentucky Statute, therefore, the section has no application in this case.

But if it is held that Section 453, Kentucky Statutes applies in this case, the fact remains that the original charter of Appellee did not expire until the 2nd day of June, 1914.

Section 6 of Apellee's original charter is in the following language:

> "The day of commencement of the corporation is the 1st day of June, in the year One Thousand, Eight Hun-

> dred and Eighty-nine, and it shall terminate twenty-five years *thereafter, subject to such extensions of its term of existence as by law provided.*"

Appellee originally became a corporation on the 1st day of June, 1889, its life began on that day, and by the section quoted above, that life was to continue for twenty-five years *thereafter.* In order to reach the conclusion that Appellee's charter expired the 31st day of May, 1914, both the day on which it came into existence and the day that measured the termination of its life must be excluded.

Such a construction is in conflict with the decisions of the Appellate Court of Kentucky construing the Statute referred to in the second brief of appellant, and similar Statutes.

Mooar vs. Covington City National Bank (80th Ky. 306), involved the sole question as to when a replevy bond became due, and on which an extension might be legally issued, the Court of Appeals say:

> "The rule is well settled that where the computation is to be made from the *act done,* then the day on which it is done must be included, *but if to be made after or from the day itself, the day must be excluded.*"

By the terms of Appellee's original charter, it came into existence on the 1st day of June, 1889. Appellee did not begin to exist from the act done, but from and after the day on which it was created.

Again, in the 80th Kentucky, the Court of Appeals say:

"If the replevy bond was executed on the 28th day of February, the day on which the bond in this case was executed (the act done), the plaintiff could no longer proceed with his execution, and from that time to the 28th day of May, *and including the latter day*, the replevy continued.

If the day on which Appellee began its original corporate existence is to be excluded, the day on which its existence, by the terms of its original Articles expired, must, under the decision quoted, and under all the decisions of the Court of Appeals, be included.

If the day on which Appellee's original corporate existence expired is to be included, as it must be under the decisions of the Kentucky Court of Appeals, Appellee's corporate life expired on June 2nd, 1914, and on that day, Appellee continued its corporate existence under its amended Articles, adopted May 6th, 1914.

But no matter when Appellee's amended charter took effect, that question is not presented, either by the pleadings or the facts stipulated.

But if it was, Appellant could not successfully make that question.

Only the State Can Question the Legality of the Organization of a Corporation.

The attempt of Appellant to argue either that Appellee had no power to extend its corporate life, or that its amended Articles filed May 6th, 1914, were a nullity, is futile; it cannot raise

that question, no matter whether Appellee is a corporation de jure or de facto.

That question can be made only by the State.

COOK ON CORPORATIONS, 7TH EDITION, VOL. 2, ... PAGE 1958.

We have just said Appellant cannot, under any state of case successfully make the question that Appellee is not a corporation.

In Cook on Corporations, Vol. 2, page 1958, the author says:

> "In general it may be said that the uniform current of authority is to the effect that only the State may question the legality of the organization of a de facto corporation. Hence if it is a de facto corporation, persons sued by a corporation in an action ex contracto, as well as persons sued by a corporation in an action ex delicto, are equally debarred from setting up the defense that the corporation was not legally organized."

To sustain this text, the author cites, in Note 4, a large number of cases, both Federal and State, in which it has been uniformly held that the defense which Appellant is relying upon here in some of its briefs, but which it did not plead, cannot be made.

Among the cases cited are Wells Company vs. Avon, Mills 198th U. S. 177; Old Colony Trust Company vs. City of Wichita, 123rd F. R. p. 762.

In Harrison vs. Philadelphia Ship Insurance Company, 217th U. S. 613, this Court says:

"The validity of a corporate charter, or of a particular power conferred thereby, cannot be inquired into collaterally but must be the subject of a direct attack of the Commonwealth." (171st F. R. 178; 99 C. C. A., 613; 217th U. S., 603.)

A Concluding Statement.

That Appellant granted Appellee the right and franchise, under the ordinance of June 3rd, 1889, for the purposes therein stated, during its corporate existence, is, as we believe, too plain for argument.

Apellee Has a Right to a Perpetual Franchise.

The case of City of Owensboro vs. Cumberland T. & T. Co., 230 U. S., 58-76, is conclusive of the only question involved on this appeal. In thrat case, which is parallel to the case at bar, this Court held that a grant to the Cumberland T. & T. Co. to occupy the streets of the City could, under the law, be extended from time to time and such grant continued during the life of the corporation whether that life was limited to the terms of its original charter or was continued, as in this case, by amended articles extending the existence of the corporation.

The question of Appellee's rights, under the contractual ordinance between it and Appellee, of June 3rd, 1889, is fully considered by Judge Evans in his opinion, a copy of which opinion we file as an Appendix to this brief.

The statement of the Court contained in that opinion as to the rights of Appellee under the ordinance of June 3rd, 1889, are so explicit and direct that any further argument on that subject appears to be unnecessary.

We refer the Court to the well considered and carefully prepared opinion of the learned District Judge who decided this case.

On the issues made in the pleadings, the agreed facts and the law of the case, Appellee asks that the judgment of the lower Court be affirmed.

Respectfully,

WILLIAM T. ELLIS,

Attorney for Appellee,

Owensboro Water Works Company.

JAMES J. SWEENEY,

Of Counsel.

APPENDIX.

Opinion Delivered by Judge Evans.

Filed December 17th, A. D. 1914.

Though we have given this case very careful consideration upon all the points discussed at the hearing, it seems to be quite unnecessary to do more than briefly state the conclusions reached upon the several propositions upon which our decision must turn.

I.

The City needed a water supply system, and to meet this want the Owensboro Water Company (hereinafter called the Water Co.), which was a corporation organized under the laws of Kentucky, on Sept. 9, 1878, by an ordinance then duly enacted by the defendant City, was granted the necessary franchise to enable it to use the streets of the City for the purpose indicated.

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II.

The City afterwards grew quite rapidly and apparently the capacity of the Water Co., become somewhat inadequate to meet the increasing demands upon it by the City and its inhabitants. The law of Kentucky authorizing the organization of corporations generally, was embraced in Chapter 56 of the

General Statutes which had been adopted by the Act approved April 22, 1873. Under this law the complainant (which we shall call the Water Works Co.) in 1889 adopted, in due form, its articles of incorporation, and was organized thereunder with a large capital. Evidently it was contemplated that the Water Works Co., would purchase the plant of its inadequate predecessor, the Water Co. Before it would do this, however, and expend the large sums necessary to achieve the objects in view, it desired to be assured of the consent of the City by a grant from it of the necessary franchise and permission to use the City's alleys and other public highways. The City thereupon duly enacted an ordinance on June 3, 1889, granting to the Water Works Co. the desired franchise and permission. Thereafter, and upon the faith of this ordinance, the Water Works Co. purchased and paid for the plant of the Water Co., and proceeded to construct and put in operation the additional facilities needed for supplying the City and its inhabitants with water. This ordinance, by the consent of all parties in interest, substituted the Water Works Co. to the Water Co. in the contract of the latter to supply the City with hydrants at certain public places and also *enter* for other public purposes for a period of 25 years from Sept. 9, 1878.

III.

After April 22, 1873, and until 1893, the General Statutes were in force, and, so far as applicable to present purposes, its provisions were as follows:

Section 1 permitted any number of persons to "associate themselves together and become incorporated for the transac-
180 tion of any lawful business except banking and insurance and the construction of railroads." Section 3 required that articles of incorporation should be adopted, acknowledged and recorded. Section 4 prescribed what the articles should specify, and Section 5 directed what notice should be published. Section 7 contained the following provision, admittedly of great importance at this point. Its language was "Corporations for the construction of any work of internal improvement may be formed to endure for fifty years; those formed for other purposes shall not exceed twenty-five years in duration; but in either case they may be renewed from time to time for periods not greater than was at first permissible, if three-fourths of the vote cast at any regular election held for that purpose shall be in favor of such renewal."

The articles of incorporation of the complainant Water Works Co., expressly set forth—article 6 its claim to the benefit of this last provision, but that concerns us now only to the extent of saying that by the consent and vote of the requisite number of its shareholders the Water Works Co., by duly executed amendments to its articles in May, 1914, extended the period of its existence for 25 years from June 1st, 1914.

It may be noted that by-laws enacted in July, 1893, after the adoption of the present Constitution of the State in 1891, the General Statutes were superseded by the compilation known as the Kentucky Statutes, and that under chapter 32 of that compilation no time limit is fixed upon the life of corporations

now created, and Sections 559 and 574 of the Kentucky Statutes found in that Chapter are as follows:

"Sec. 559. Any corporation may by the consent in writing of the owner of at least two-thirds of its capital stock, change or amend any of the articles of its incorporation, and such alteration or amendment shall be signed and acknowledged by the directors, or a majority of them, and filed and record as articles of incorporation are required to be."

"Sec. 574. The charter or articles of incorporation of any corporation heretofore created or organized under or by the laws of this State may, after such corporation has accepted, as herein provided, the provisions of the Constitution, be
181 amended in the manner provided for the amendment of the articles of incorporation or corporations organized under this chapter and the laws relating to such corporations."

IV.

The ordinance of June 3, 1889, after reciting in its preamble certain reasons for its enactment, did, in fact, enact and publish that ordinance in this explicit language, viz.:

"Sec. 1. That in consideration of the purchase by the Owensboro Water Works Company, of Owensboro, Kentucky, of the water works of the Owensboro Water Company, the franchise and license are hereby granted to the Owensboro Water Works Company, of Owensboro, Kentucky, and to its successors and assigns, for and during the existence of the said corporation, to maintain, complete and operate water works in

the City of Owensboro for supplying the City of Owensboro and the inhabitants of said city and its vicinity with water for public and private purposes, and to use within the present and future limits of the City of Owensboro, the streets, alleys and other public highways thereof for the purpose of laying, repairing and taking up mains, service pipes, hydrants, and other apparatus for the supply of water.

"But there shall be no continued unreasonable obstruction of the said streets, alleys and other public highways, and after their use from time to time, they shall be restored by the said water works company as near as practicable to their former condition; and the said grant is subject to the existing right of purchase of the said water works by the said City of Owensboro.

"Sec. 2. That, in like consideration of the said purchase, by the Owensboro Water Works Company, of Owensboro, Kentucky, of the Water Works of the Owensboro Water Company, the City of Owensboro hereby accepts the said The Owensboro Water Works Company of Owensboro, Kentucky, as the successor to the contract for hydrant rental now existing between the City of Owensboro and the Owensboro Water Company as fully as if such existing contracts had been originally made by the City of Owensboro with the said The Owensboro Water Works Company, of Owensboro, Kentucky, without the intervention of the said Owensboro Water Company.

"Sec. 3. That the consent of the City of Owensboro is hereby given to the consummation of the said purchase of the said water works of the Owensboro Water Company by the

Owensboro Water Works Company of Owensboro, Kentucky, and upon such consummation the Mayor and City Clerk of the City of Owensboro are hereby authorized and instructed to seal duplicate copies of the ordinances with the seal of the City of Owensboro, and to sign such copies as a contract between the City of Owensboro, and the Owensboro Water Works Company, of Owensboro, Kentucky, and to deliver one of such copies so signed and sealed to the Owensboro Water Works Company of Owensboro, Ky., and to accept the other in behalf of the City of Owensboro, when signed and sealed by the said The Owensboro Water Works Company, of Owensboro, Kentucky."

"Sec. 4. This ordinance shall take effect at its passage and publication."

Counsel seem to be in accord in the view that the rights of the parties must depend upon a proper construction of the first section of the foregoing ordinance. It is contended for the City

182 that the words therein: "That in consideration of the purchase by the Owensboro Water Works Company of Owensboro, Kentucky, of the water works of the Owensboro Water Company, the franchise and license are hereby granted to the Owensboro Water Works Company of Owensboro, Kentucky, and to its successors and assigns for and during the existence of said corporation, to maintain, complete and operate water works in the City of Owensboro," &c., and especially that the words, "during the existence of said corporation," refer to the Water Co. and not to the Water Works Co., and counsel illustrate their argument by reference to the ordinance of Sep-

tember 10th, 1878, and particularly Section 13 thereof, but it cannot be forgotten that this last ordinance was enacted about eleven years before that of June 3, 1889, and had reference alone to the Water Co. and not to the complainant, which was not then in existence.

We think it entirely clear from every point of view that defendant's contention is not maintainable, and that the manifest meaning of the language quoted from Section 1 of the ordinance of June 3, 1889, is to grant the franchise and license referred to therein to the complainant for and during its existence. The language of Section 1 means that and nothing else, and hence we must ascertain what was meant by the phrase "during the existence" of that corporation. Did it mean its existence as then limited to 25 years, or did it mean the existence of the Water Works Co. under the potentialities of the Sixth of its articles of incorporation and the law of Kentucky under which those articles were adopted? Remembering that the complainant Company was given its general powers by the State alone but that the City having been given by the legislature the power of control over its streets, &c., it could grant the franchise and license specified in the ordinance of June 3, 1889, we think the City must be held to have enacted the last named ordinance in contemplation of the exercise by the Water Works Co. of
183 the right of extending or renewing from time to time the period of its existence, and especially as amendments thereto when adopted became part of the original articles as expressly provided in Section 540, Kentucky Statutes, Chapter 32. If this be the correct view the complainant corporation has never

ceased to exist, but is still in existence, and may, possibly, at its option, by the required vote, extend that existence indefinitely.

V.

Speaking generally, the recent case of City of Owensboro vs. Cumberland Telephone Company, 230 U. S. 58, seems to be conclusive of this case.

And it may be that what was said by the Supreme Court in the City of Louisville vs. Cumberland Telephone Co., 224 U. S. at pages 663 and 664, also has an instructive bearing upon this case.

VI.

The defendant has pleaded separately three certain matters of estoppel, but little or no attention was given either of them at the hearing, and they do not seem to be very forceful.

1. The deefndant pleads in estoppel of complainant's right to make the claim now set up, the judgment of the Daviess Circuit Court in a suit brought there by the Water Works Co. to recover from the City certain rentals accruing after Sept. 10, 1903, upon the hydrants and certain compensation for water supplied to the city for public purposes after that date. The City's defense to those claims was that the contract created by the ordinance of September 1878 (and to the right of the Water Co. in which the Water Works Co. has been substituted by the ordinance of June 3, 1889), had been fully performed and had no binding force after September 10, 1903. Neces-

sarily this was limited to such rentals and compensation, as that was the only matter then in litigation and the only question involved in that suit. The Court so adjudged, and no one makes any claim that it was wrong. The complaint in the suit
184 now before us has no reference to the matters litigated in the State Court.

2. The defendant also claims to have relied upon certain acts and conduct of the Water Works Co. as constituting an agreement between them that complainant's rights under the ordinance of June 3, 1889, expired on September 10, 1903, and that, relying thereon, defendant itself created and about 1903, installed its own water supply system, at an expense of $400,000, in order to make it capable of supplying the City and its inhabitants with all the water needed, and claims that these facts and its knowledge of them estop the complainant from now insisting that its rights continued or existed after Sept. 10, 1903. Whether it was wise or unwise, without a previous and definite judicial ascertainment of complainant's rights under its contract for the city to make that expenditure for that purpose, is matter of no present concern. But the fact that the City did make itself a competitor in business, instead of buying complainant's plant as the ordinance of June 3, 1889, expressly reserved the right to do, in no way increases the City's rights as against complainant, and in no way diminishes complainant's rights under the contract undoubtedly created by the ordinance of June 3, 1889, unless we are entirely wrong in our construction of that instrument. If there were no contract between the parties after Sept. 3, 1903, complainant's contentions are wrong, but if there were, then

defendant's contentions are wrong. That question can not be determined upon any idea of estoppel, but upon the construction of the ordinance. The City's rights must be thus determined, and it can not destroy any right complainant has by arbitrary exercise of power over a competitor of its own creation. It must be as fair and just as if it had no water works of its own. Besides, it has another great advantage over the complainant for, if it does not purchase under the right reserved in the ordinance of June 3, 1889, it can, by giving just compensation, con-
185 demn complainant's property to its use, while complainant has no such power as against the City; and

3. Certain expressions in complainant's pleadings in suits some time pending in the United States Circuit Court in this District, and in the State Court to the effect that the contract between the parties was for an exact period of 25 years, are relied upon as furher matter of estoppel against the claim now made by complainant that it continues to exist. These pleadings were adjusted to the situation as it existed in 1903 and 1904, long before June, 1914. It was altogether true at the time those pleadings were filed that the existence of the complainant Water Works Co. was nominally limited to 25 years; the exigencies of those litigations in no way called for any specific allegation beyond that—certainly not as to the legal right to extend its duration—and the statements then made abundantly met the then requirements of the questions involved. It was, therefore, wholly unnecessary and unimportant that the complainant, under those circumstances, should have shown that the power existed for an extension of that 25 years to other periods of like duration.

We can conceive of no estoppel arising out of a situation like this for the contract can not be destroyed by any failure to unnecessarily overplead.

It does not seem to be useful to extend the discussion further, as no one of the matters set up in estoppel is sufficient to bar complainant's right to assert its present claim to the continued existence of its contract, generally, though section 2 of the ordinance of June 3, 1889, explicitly shows that that part of it which specifically related to the stipulation pertaining to hydrant rentals was to terminate in September, 1903. And it may not be out of place to emphasize the fact that while complainant purchased the Water Co.'s property in 1889 and agreed to make good the Water Company's contract respecting hydrant rentals until September, 1903, and no longer, the complainant did not obtain its corporate powers nor its Owensboro franchise
186 from the Water Co., nor from the ordinance of September, 1878, but got them through its own Articles of Incorporation and the ordinance of June 3, 1889, independently of those of the Water Company.

VII.

We recall no other question made by the pleadings or discussed at the bar in any other way calling in question complainant's franchise powers, though there may be certain affirmative allegations in defendant's answer which, standing controverted under Equity Rule No. 31, are not important because not supported by testimony.

VIII.

The City has enacted several ordinances since that of June 3, 1889, with a view merely to regulate the complainant's use of its streets, alleys, &c., but these have not been complained of, indeed, the complainant in its bill very properly says:

"Complainant company states that it has at all times and is now willing to comply with all reasonable rules, regulations and conditions which defendant city may in the exercise of its police power, prescribe for the protection of defendant City and its inhabitants against loss, injury or damage by reason of the digging of trenches or making excavations in any street, alley, sidewalk or any of the public grounds of said city for the purpose of laying, or taking up, or repairing any of its water pipes, or any of the connections with its water pipes; and it has at all times, and is now, willing to cause all pavements, curbings and parts of any streets removed by it in the exercise of its franchise to maintain a water works system in the City of Owensboro, Kentucky, to be relaid and repaired in said streets, alleys or avenues, sidewalks or public places to be put in as good condition and repair as the same was immediately preceding such excavation."

But two other ordinances, namely, that of November 7, 1901, (which for many years has apparently lain dormant) and that of July 6th, 1914, copies of which are exhibited with the bill, are now sought to be enforced against complainant upon the idea that its contract, in every event, terminated June 3, 1914.

The ordinance of November 7, 1901, is a long one, and all that need be said of it now is that many of its provisions are subversive of the rights of complainant Water Works Com-
187 pany as those rights have been fixed in the contract between the parties embraced in the ordinance of June 3, 1889.

The ordinance of July 6, 1914, is as follows:

"COUNCIL HALL, July 6, 1914.

"At a meeting of the Common Council of Owensboro, held in said city on July 6, 1914, the following resolution was passed to-wit:

"Whereas, the franchise heretofore granted by the City of Owensboro to the Owensboro Water Works Company permitting said company to lay its pipes and mains in the streets and alleys of said city has expired, and

"Whereas, the said Owensboro Water Works Company has now neither the right nor the consent of said city to use the streets, alleys or public highways of said City, therefore,

"Be it resolved that the Mayor, be and he is, hereby authorized and directed to notify the said Owensboro Water Works Company, that it must cease to dig up or disturb the streets, alleys or public highways of said city in any way whatsoever; and the said Mayor shall take all necessary steps to make said notice and order effective.

"Be it further resolved that the city engineer be, and he is, hereby directed not to grant a permit to dig up or disturb the streets of the City of Owensboro to the Owensboro Water

Works Company, nor to any person employed by said company."

Manifestly this ordinance strikes at and was intended to strike at the very existence of the complainant, and at the rights it claims under the contract. Indubitably, therefore, the legislative department of the city, to which the State of Kentucky has delegated power to legislate for certain municipal purposes, by enacting this ordinance, did that which must inevitably impair the obligation of that contract.

Both of these ordinances, indeed, appear to us to be attempts by the defendant City, through its legislative and other departments, not to regulate within proper bounds, but to impair and indeed to destroy the obligation of the City's contract with complainant. These attempts, if successful, will result in the arbitrary abrogation of the contract without complainant's consent. If this be the correct view the relief prayed for in complainant's bill should be granted, and a decree accordingly may be prepared by counsel and presented for approval, enjoining the enforcement of every part of each of the two last named ordinances, so far as either may conflict with the views herein expressed.

(Signed) WALTER EVANS, *Judge.*